

4-1-1993

## The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant

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### Recommended Citation

Madeline Henley, *The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant*, 41 Buff. L. Rev. 703 (1993).

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# The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant

MADELINE HENLEY\*

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\* J.D., University at Buffalo School of Law. I thank Professor Isabel Marcus for her warm support and invaluable suggestions, Professor Elizabeth Mensch for her insightful critique of an earlier draft, and Professor Janet Lindgren for encouraging me to trust my instincts. I am also grateful to my editors, Darin Bifani and Miles Afsharnik, for their gentle prodding, generous patience, and editorial expertise.

*I came to explore the wreck.  
 The words are purposes.  
 The words are maps.  
 I came to see the damage that was done  
 and the treasures that prevail.  
 I stroke the beam of my lamp  
 slowly along the flank  
 of something more permanent than fish or weed*

*the thing I came for:  
 the wreck and not the story of the wreck  
 the thing itself and not the myth . . . .<sup>1</sup>*

### INTRODUCTION

We live in a world of culturally constructed myths.<sup>2</sup> We are their authors, their audience, their heroines and villains. These myths defy easy characterization: they enlighten and obscure, reveal and construct reality, reflect and refract unacknowledged assumptions and prejudices. Because they are comprised of truth and fiction, myths may be simultaneously accurate and deceptive.<sup>3</sup> Myths are constant—generations subscribe to the same myths—and yet protean, able to adapt to changes in knowledge and social sentiment.<sup>4</sup> Our perspective on a myth will influence the meaning we ascribe to it and the use to which it is put.

Judges and legislators, as cultural participants, are privy to and rely upon myths, consciously and unconsciously, to understand and persuade. As influential public actors, they are in a unique social position to enforce myths. The powerful role myths play in shaping legal outcomes has been evident in the recent judicial and

1. ADRIENNE RICH, *Diving Into the Wreck*, in ADRIENNE RICH'S POETRY 65, 67 (Barbara Charlesworth Gelpi & Albert Gelpi eds., 1975).

2. Myths are inscribed by and in each of us, permeate our thoughts and infuse all human institutions. Pierre Maranda quotes Levi-Strauss: "Les mythes se pensent dans les hommes" and explains: "That is, we are thought out by the semantic structures that charter us. The traditions in which our lives are embedded 'think themselves out,' i.e., unfold and display their semantic resources through the people they traverse, and who perpetuate these traditions over time." Pierre Maranda, *The Dialectic of Metaphor: An Anthropological Essay on Hermeneutics*, in THE READER IN THE TEXT 183, 184 (Susan R. Suleiman & Inge Crosman eds., 1980).

3. "Depending on the vantage point, myths are simultaneously true and fictional." Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 4 (1992). "[M]yths frequently combine facts and fantasy, and gradually change over time. Myths are living creations of a culture, and viewed from within the culture, they represent core values that some may also view as central truths." *Id.* at 3-4.

4. "Myths are stories that are distinguished by a high degree of constancy in their narrative core and by an equally pronounced capacity for marginal variation." HANS BLUMENBURG, WORK ON MYTH 34 (Robert M. Wallace trans., 1985).

legislative use of Norplant,<sup>5</sup> a long-acting contraceptive device that is surgically implanted in a woman's arm.

The Food and Drug Administration's (FDA) approval of Norplant for distribution in the United States on December 10, 1990<sup>6</sup> met with immediate reaction from the public, judges and legislators. On December 12, *The Philadelphia Inquirer* published an editorial with the headline, *Poverty and Norplant—Can Contraception Reduce the Underclass?*, suggesting that African-American women on welfare be implanted with Norplant to reduce the welfare burden.<sup>7</sup> Within three weeks of FDA approval, a California judge directed an African-American woman on welfare who pled guilty to child abuse to undergo Norplant implantation as a condition of probation.<sup>8</sup> Within six weeks, a state legislator introduced two bills focusing on Norplant. The first authorized the payment of cash incentives to women on welfare who would agree to implantation with Norplant,<sup>9</sup> and the second proposed mandatory Norplant implantation of women convicted of certain drug-related offenses.<sup>10</sup> Other judges and legislators have followed suit with similar measures,<sup>11</sup> and currently all fifty states and the District of Columbia fund Norplant through their Medicaid programs.<sup>12</sup>

To understand the judiciary's and legislature's swift enlistment of Norplant for use in the welfare and criminal contexts,<sup>13</sup> this

5. For a description of the Norplant device, see *infra* notes 164-77 and accompanying text.

6. *Long-Term Contraceptive Approved*, [1990-1991 Transfer Binder] Food Drug Cosm. L. Rep. (CCH) ¶ 42,180 (Dec. 26, 1990).

7. *Poverty and Norplant—Can Contraception Reduce the Underclass?*, PHILADELPHIA INQUIRER, Dec. 12, 1990, at A18. The public outcry was such that the newspaper printed an apology. Tamar Lewin, *Implanted Birth Control Device Renews Debate over Forced Contraception*, N.Y. TIMES, Jan. 10, 1991, at A20.

8. *People v. Johnson*, No. 29390 (Cal. Super. Ct. Tulare County 1990). See *infra* notes 219-46 and accompanying text for a discussion of *Johnson*.

9. Kan. H.B. 2089, 74th Leg., 2d Sess. (1991); David S. Coale, Note, *Norplant Bonuses and the Unconstitutional Conditions Doctrine*, 71 TEX. L. REV. 189, 195-96 n.40 (1992) (citing Kerry Patrick, *Poor Women and Society Benefit by Linking Norplant, Welfare Aid*, WICHITA EAGLE, Mar. 4, 1991, at 11A).

10. Kan. H.B. 2255, 74th Leg., 2d Sess. (1991); Coale, *supra* note 9, at 195-96 n.40.

11. See *infra* notes 288-301 and accompanying text for a discussion of the legislative initiatives and *infra* notes 186-217 and accompanying text for judicial enlistment of Norplant.

12. *Birth Control Implant Gains Among Poor Under Medicaid*, N.Y. TIMES, Dec. 17, 1992, at A1 [hereinafter *Implant Gains Among Poor*].

13. Dr. George Annas, Director of the program on law, medicine and ethics at the Boston University School of Medicine, remarked at the speed with which judges and legislators have gravitated towards Norplant: "I think we're going to see more of these cases. It's kind of amazing that this has happened already, when hardly any physicians even know how to implant this thing." Lewin, *supra* note 7, at A20 (quoting Dr. George Annas). One commentator remarked at how rapidly Washington's Department of Social

Comment examines the myths that inspire the Norplant measures<sup>14</sup> and considers the process by which judges and legislators weave myths into the law.<sup>15</sup> This Comment focuses on the legal invocation of the "mother/body" myth—the notion that women's conduct can be explained by and controlled through their reproductive capacity, their maternal bodies.<sup>16</sup>

Scholarly discussion of Norplant measures has addressed their legal implications,<sup>17</sup> and much of the popular debate has concen-

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and Health Services made Norplant available to welfare mothers: "The two months from FDA approval to DHHS' picking up the tab is the fastest the ponderous agency has moved on anything in recent memory." Don Williamson, *Norplant: Forced Surgery is no Answer*, SEATTLE TIMES, June 27, 1991, at A12, available in LEXIS, Nexis Library, SEATTM File.

14. This Comment will use "Norplant measures" to refer collectively to judicial and legislative action involving Norplant.

15. Judges and legislators are faced with myriad moral-social-legal decision-making dilemmas. While I am critical of the thinking behind remedial efforts which target women's reproduction, I recognize that public officials, faced with exceedingly difficult situations, are most likely acting in good faith. See Alan M. Dershowitz, *Birth Control as Penalty for Child Abuse*, L.A. TIMES, June 4, 1988, § 2, at 8 (noting the difficult issues posed in such cases). Many proponents of the Norplant measures are responding to the real problems of drug dependent infants, drug dependent mothers and welfare dependent families. See, e.g., Leon A. Espinoza et al., *They Made a Difference—Ordinary Citizens Accomplish Extraordinary Feats to Leave Their Mark on 1991*, SEATTLE TIMES, Dec. 18, 1991, at F1, available in LEXIS, Nexis Library, SEATTM File (commending two women for their work with infants born to drug-addicted mothers. These women believe that drug-addicted mothers who give birth to several drug-affected children should be implanted with Norplant if necessary.); Lewin, *supra* note 7, at A20 (quoting Dr. George Annas of Boston University) ("A lot of people have given up on social policy, on taking care of poor women, and there is an increasing undercurrent that since we don't know what to do about crack addicts, people with AIDS and child abusers, we should stop them from having kids.").

Judges are also frustrated with traditional, seemingly ineffective sanctions. *Unusually Creative Judges Now Believe Some Punishments Can Fit the Times*, CHI. TRIB., July 3, 1988, § 3, at 1, 7 [hereinafter *Creative Judges*] ("[Judges] are looking for creative and meaningful ways to both stop crime and offenders, yet do something along the order of rehabilitation") (quoting Herbert Hoelter, Director of the National Center on Institutions and Alternatives); see Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880, 1885 (1991) ("[D]issatisfaction with the primary punishment options has led to experimental, creative sanctions and probation conditions, which include the 'shaming and shunning' practices.").

16. See *infra* part I for a discussion of the mother/body myth.

17. The largest part of the debate over the possible and appropriate uses for Norplant has occurred in the media in the form of articles and editorials, but legal scholars have also joined the fray. For legal literature addressing Norplant, see Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?* 40 U.C.L.A. L. REV. 1 (1992); Michael T. Flannery, *Norplant: The New Scarlet Letter?*, 8 J. CONTEMP. HEALTH L. & POL'Y 201 (1992); Julie Mertus & Simon Heller, *Norplant Meets the New Eugenicians: The Impermissibility of Coerced Contraception*, 11 ST. LOUIS U. PUB. L. REV. 359 (1992); Thomas E. Bartrum, Note, *Birth Control as a Condition of Probation—A New Weapon in the War Against Child Abuse*, 80 KY. L.J. 1037 (1992); Coale, *supra* note 9; Jim Persels, Note, *The Norplant Condition: Protecting the Unborn or*

trated on arguments "for" or "against" the measures.<sup>18</sup> I hope to add to these discussions by taking a different approach.<sup>19</sup> Part I of this Comment introduces the mother/body myth by briefly exploring the origins of the view that a woman's behavior can be understood and regulated with virtually exclusive reference to her procreative capacity. It highlights rhetoric and images that signal this myth's presence.

Part II traces the development of the mother/body myth in three contexts: Section II.A illustrates the presence of the mother/body myth in the context of the involuntary sterilization of women, Section II.B illustrates the presence of this myth in the context of court-ordered contraception for criminal defendants, and Section II.C discusses the cases and laws which have enlisted Norplant. Part II highlights the similarities that unite these contexts, examines the factors that seem to catalyze the invocation of myth, and explicates the process by which myths are inscribed in law.

Part III concentrates on the bases for the myths around which

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*Violating Fundamental Rights?*, 13 J. LEGAL MED. 237 (1992); Elyse R. Rosenblum, Comment, *The Irony of Norplant*, 1 TEX. J. WOMEN & L. 275 (1992); Charlotte Rutherford, *Reproductive Freedoms & African American Women*, 4 YALE J. L. & FEMINISM 259, 261-62 (1992); See also *Requirements or Incentives by Government for the Use of Long-Acting Contraceptives*, 267 JAMA 1818 (1992) (American Medical Association, Board of Trustees Report) [hereinafter *Long-Acting Contraceptives*].

A notable work written from the public health perspective is DIMENSIONS OF NEW CONTRACEPTIVES: NORPLANT AND POOR WOMEN (Sarah E. Samuels & Mark D. Smith eds., 1992) (a collection of papers presented at a Forum hosted by the Kaiser Family Foundation in November, 1991 and published by Henry J. Kaiser Family Foundation) [hereinafter NORPLANT AND POOR WOMEN].

18. See, for example, the following editorials and letters to the editor: Walter A. Graham, *Norplant Can Aid Mothers*, USA TODAY, Feb. 16, 1993, at 10A; *Compelling the Use of Contraceptives*, WASH. POST, Jan. 27, 1993, at A18; *Only Abstinence Will Put End to Teen Pregnancy*, ATLANTA J. & CONST., Dec. 23, 1992, at A15, available in DIALOG, ATLANTA-JC File; *Norplant Debate—How Can Eliminating one Problem Add to Another?*, SEATTLE TIMES, July 31, 1991, at A8, available in LEXIS, Nexis Library, SEATTM File; *Drug-Addicted Moms—Norplant Would Enable us to Keep Denying the Real Problems*, SEATTLE TIMES, July 16, 1991, at A7, available in LEXIS, Nexis Library, SEATTM File; *Welcome Contrast on Birth Control; Gov. Wilson's Contraceptive Plan has Risks, But It's a Start*, L.A. TIMES, May 20, 1991, at B4; *Judge Orders Birth Control for Abusive Mother*, L.A. TIMES, Jan. 30, 1991, at B6.

19. I do have a bias against the Norplant measures insofar as they represent State efforts to discourage certain women from reproducing. Yet I have not chosen my approach to this subject because of my inclination to oppose the Norplant measures. Rather, my approach reflects a different way of thinking about the Norplant measures than traditional argument or resort to legal doctrine. In part, this is because neither the legal doctrine which might protect probationers, nor the various arguments which might protect recipients of entitlements, are very useful in grappling with the larger issues the Norplant measures raise. I attempt to rethink the issues raised by the Norplant measures, and to consider also what the proliferation of these measures say about how we think.

the Norplant measures are built. It also shows how the Norplant device and its uses perpetuate the myth that women can and should be controlled by their bodies. Part III asserts that the myths that underlie the Norplant measures influence and reinforce claims about women's relationship to their reproductive capacities, and that these myths are perceived as justifying the imposition of the Norplant measures themselves. For, it is suggested, the Norplant measures justify their own existence by creating and perpetuating the conditions which allegedly warrant their imposition. Part III concludes by examining the costs of the Norplant measures for women's bodies and for judicial and legislative analysis.

While acknowledging the difficulty involved in identifying and decoding myths, this Comment advocates that our use of them become more thoughtful and conscious. We determine the role of myth in our lives. We can thoughtlessly repeat myths, preserving them, or we can try to understand them and ourselves in relation to them. This Comment's goal is to make explicit what judges and legislators have left implicit, to say out loud what has been left for us—their audience—to silently and complicity insert. In so doing my hope is to encourage a discussion of how the legal system might become more reflective about and accountable for its role in perpetuating myths.

### I. THE MOTHER/BODY MYTH

*[The] linkage of the concepts 'women-bodies-nature' which operate[s] to deny women's responsibility (they can't help it) whilst ironically discovering them to be culpable (they bring it on themselves), remains a powerful element in the construction of women as legal subjects.*<sup>20</sup>

Numerous cultures over many centuries have mythologized mothers.<sup>21</sup> A woman's potential for motherhood has been perceived and treated as the defining characteristic of her existence,<sup>22</sup> causing women's child-bearing capacity to assume an exaggerated central-

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20. CAROL SMART, *FEMINISM AND THE POWER OF LAW* 96 (1989). Sherry Ortner also observes that women have been seen as "closer to nature" because of their bodies—their reproductive capacities. Sherry B. Ortner, *Is Female to Male as Nature is to Culture?*, in *WOMAN CULTURE & SOCIETY* 67, 73 (Michelle Rosaldo & Louise Lamphere eds., 1974).

21. See generally EDWIN O. JAMES, *THE CULT OF THE MOTHER-GODDESS* (1961) (cross-cultural studies of myths about mothers); ERICH NEUMANN, *THE GREAT MOTHER* (1955) (same); JAMES J. PRESTON, *MOTHER WORSHIP: THEME AND VARIATIONS* (1982) (same). See also WOLFGANG LEDERER, *FEAR OF WOMEN* (1968) (reviewing changing societal perceptions of women from ancient times through the twentieth century).

22. "Woman's status as childbearer has been made into a major fact of her life." ADRIENNE RICH, *OF WOMAN BORN* xiii (1976); JEANNE M. STELLMAN, *WOMEN'S WORK, WOMEN'S HEALTH, MYTHS AND REALITIES* 179 (1977) (identifying the "perpetual pregnancy myth"—that is, the assumption that "because a woman *can* bear children . . . she *will* bear children.").

ity.<sup>23</sup> Woman-mother-body has been linked in thought and understanding. Women's bodies have been thought to reflect aspects of their conduct and temperament,<sup>24</sup> and that conduct and temperament has in turn been understood as derived from their bodies, particularly with regard to reproductive matters.<sup>25</sup> Women have been seen as "naturally" unstable,<sup>26</sup> irrational,<sup>27</sup> hysterical,<sup>28</sup> unreliable<sup>29</sup> and lacking in self-control.<sup>30</sup> Women have been viewed, in short, as "the product and prisoner of [their] reproductive system[s]."<sup>31</sup>

This biological reductivism persists,<sup>32</sup> and defining women in terms of their bodies has served to circumscribe women's societal and cultural value.<sup>33</sup> Similarly, women's so-called "natural" unreli-

23. In 1870 a physician described this view of reproduction as the central and defining force of women by saying it is "as if the Almighty, in creating the female sex, had taken the uterus and built up a woman around it." Carroll Smith-Rosenberg & Charles Rosenberg, *The Female Animal: Medical and Biological Views of Woman and Her Role in Nineteenth-Century America*, 60 J. AM. HIST. 332, 335 (1973).

It is interesting to note that what I term "myth" can also be termed "truth"; the notion that reproduction is central to womanhood can be seen as a cultural distortion or as a simple statement of fact. This duality, that depending on one's perspective a myth can represent truth or fiction, explains myths' elusiveness and power.

24. See JANE M. USSHER, *THE PSYCHOLOGY OF THE FEMALE BODY* 1-17 (1989).

25. See, e.g., ERIK ERIKSON, *IDENTITY: YOUTH AND CRISIS* 285 (1968) (arguing that anatomy is destiny "insofar as it determines not only the range and configuration of physiological functioning and its limitation but also, to an extent, personality configurations. The basic modalities of woman's commitment and involvement naturally also reflect the ground plan of her body"); ELAINE SHOWALTER, *THE FEMALE MALADY: WOMEN, MADNESS AND ENGLISH CULTURE, 1830-1980*, at 55 (1985) (asserting that "theories of female insanity were . . . linked to the biological crises of the female life-cycle—puberty, pregnancy, childbirth, menopause").

26. SMART, *supra* note 20, at 95 (historically women were considered "unstable . . . especially . . . at times of child birth"). See also USSHER, *supra* note 24, at 1.

27. See, e.g., Elizabeth V. Spelman, *Aristotle and the Politicization of the Soul*, in *DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE* 17 (Susan Harding & Merrill B. Hintka eds., 1983) (discussing Aristotle's alignment of the female with the irrational).

28. See, e.g., USSHER, *supra* note 24, at 3-9.

29. *Id.* at 4.

30. See SHOWALTER, *supra* note 25, at 55 ("[T]he prevailing view among Victorian psychiatrists was that . . . women were more vulnerable to insanity than men because the instability of their reproductive systems interfered with their sexual, emotional, and rational control.").

31. Smith-Rosenberg & Rosenberg, *supra* note 23, at 335. Adrienne Rich also contends that the "institution" of motherhood, "aims at ensuring that . . . all women . . . shall remain under ample control." RICH, *supra* note 22, at xv. She continues, "This institution . . . has alienated women from our bodies by incarcerating us in them . . . women are controlled by lashing us to our bodies." *Id.*

32. USSHER, *supra* note 24, at xi, 9.

33. Ortner, *supra* note 20, at 87 asserts that the "consequence of the woman/nature link "is a (sadly) efficient feedback system: various aspects of woman's situation (physical, social, psychological) contribute to her being seen as closer to nature, while the view of



ability or lack of self-control has formed a basis for invading and regulating their reproductive lives. Where internal control has been found lacking, external control has been imposed.<sup>34</sup> This has been particularly true for African-American women, who have traditionally been characterized as especially lacking sexual and reproductive self-control.<sup>35</sup>

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her as closer to nature is in turn embodied in institutional forms that reproduce her situation." *Id.* at 67, 87. Sara Ruddick notes this irony: "In most societies . . . women are socially powerless in respect to the very reproductive capacities that might make them powerful. The primary bodily experience of mother is a poignant reminder that to think of maternal power is immediately to recall maternal powerlessness—and conversely." Sara Ruddick, *Maternal Thinking*, in *WOMEN, CULTURE AND MORALITY* 207, 209 (Joseph L. DeVitis ed., 1987). Similarly, Reva Siegel writes:

For too long this nation has regulated women's status through the institution of motherhood. Its judgments about the ways in which it is reasonable to impose on women as mothers are deeply distorted by a long history of denigrating, controlling, and using women as mothers. For this reason, the physiological paradigms that currently dominate review of reproductive regulation are deeply pernicious.

Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261, 380 (1992).

34. Adrienne Rich has noted that "[e]ven safely caged in a single aspect of her being—the maternal—[woman] remains an object of mistrust, suspicion, misogyny in both overt and insidious forms." RICH, *supra* note 22, at 116. Attempts to control women's childbearing in the context of reproductive technology has been characterized as an attempt to conquer woman's nature and contain her excesses. "It has been suggested that men's alienation from reproduction . . . has underpinned through the ages a relentless male desire to master nature, and to construct social institutions and cultural patterns that will not only subdue the waywardness of women but also give men an illusion of procreative power." Michelle Stanworth, *Birth Pangs: Contraceptive Technologies and the Threat to Motherhood*, in *CONFLICTS IN FEMINISM* 288 (Marianne Hirsch & Evelyn Fox Keller eds., 1990).

35. African-American women have particularly been mythologized in that their lack of control of sexuality and reproduction has been seen as culturally defining. Dorothy E. Roberts, *Punishing Drug Addicts who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 *HARV. L. REV.* 1419, 1438, 1444, (1991) (describing the myth of the sexuality promiscuous black woman—the Jezebel—"a woman governed by her sexual desires"); JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS; A HISTORY OF SEXUALITY IN AMERICA* 101 (1988) ("According to popular white opinions, black women had strong passions and always desired sexual relations."). Patricia Williams put it this way:

We live in a society in which the closest equivalent of nobility is the display of unremittingly controlled will-fulness. To be perceived as unremittingly will-less is to be imbued with an almost lethal trait. . . . I would characterize the treatment of blacks by whites' law as defining blacks as those who had no will. I would characterize that treatment . . . as a relation in which partializing judgments, employing partializing standards of humanity, impose generalized inadequacy on a race: if pure will or total control equals the perfect white person, then impure will and total lack of control equals the perfect black man or woman.

Patricia J. Williams, *On Being the Object of Property*, 14 *SIGNS* 5, 7, 8 (1988).

Black women's perceived lack of self-control was translated into a judgment about

As reproduction came to be seen as the locus for explaining women, women's procreative capacity frequently came to serve as the site for controlling women.<sup>36</sup> Because women's conduct and psychology were thought, and not just figuratively, to have reproductive roots, the remedy was also directed there.<sup>37</sup> While the "scientific" interrelation of woman and her body has been disproved—for instance, hysteria is no longer considered a disease of the womb—the conviction that, on some level, a woman *is* her maternal body, underlies the belief that controlling a woman's procreative powers is a vehicle for controlling the whole woman. Women's bodies have thus become "a point of entry for social norms."<sup>38</sup>

The story of Eve as told in the Old Testament is a familiar myth in the Judeo-Christian tradition and represents a cultural inscription of the mother/body myth. *Genesis* recounts: "Unto the woman he said, I will greatly multiply thy sorrow in conception; in sorrow thou shalt bring forth children; and thy desire shall be by thy husband, and he shall rule over thee."<sup>39</sup> Eve is made subject to the claims of her maternal body—to pain in labor—as punishment for her sin of discovering the pleasure of knowledge: childbearing and punishment are thereby linked.<sup>40</sup> Eve's punishment for her disobedi-

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their ability to fill their social roles as mothers, as defined by the culturally prevalent norms of white middle class motherhood. See Roberts, *supra*, at 1436-45 (discussing the devaluation of black motherhood).

36. "[T]he female generative organs, the matrix of human life, have become a prime target of patriarchal technology." RICH, *supra* note 22, at 116.

37. The belief in the interrelationship of woman's psychology and her reproductive organs had been at times, quite literal, often with painful consequences for women. See USSHER, *supra* note 24, at 6-7. Ussher explains that "[a]ll women's madness, illness and deviant behavior was traditionally located in the womb . . . . Early medical interventions for a wide range of illnesses experienced by women were centered on the womb, the matrix of all problems." *Id.* at 2. See also SHOWALTER, *supra* note 25, at 73.

38. SMART, *supra* note 20, at 113. Smart warns: "[L]aw has entry into minute aspects of the life of the body and has the potential to regulate women's activities whilst appearing most liberal and benevolent." *Id.* at 97. She illustrates with this example: the "ideology of health and healthy babies—constructed as desirable personal goals, may be transposed into oppressive forms of legislation which assume the terminology of benevolence. . . ." *Id.* at 98. In fact the "ideology of healthy babies" is often proffered in defense of the Norplant measures.

39. *Genesis*: 4:16 (King James). The curse placed on Eve was given a literal interpretation into the nineteenth century. RICH, *supra* note 22, at 117.

40. See Helen Callaway, *The Most Essentially Female Function of All: Giving Birth*, in *DEFINING FEMALES: THE NATURE OF WOMEN IN SOCIETY* 163, 171 (1978) (asserting that the story of Eve "set[] the foundation for the negative attitudes towards women's sexuality and child-bearing which have continued in Western civilisation [sic] for nearly two thousand years."). See also Mieke Bal, *Sexuality, Sin and Sorrow: The Emergence of Female Character*, in *THE FEMALE BODY IN WESTERN CULTURE* 317, 320 (Susan Suleiman ed., 1986) ("The split between body and soul was retrospectively projected upon Eve as a character, as she was interpreted after the working of the retrospective fallacy: so attractive in body, so corrupt in soul, and hence, dialectically dangerous because of her

ence, a "crime" without apparent relation to reproduction, is directed at her reproductive capacity. Eve's legacy is evident in the stories of the women discussed in this Comment, stories of women defined by and regulated through their maternal bodies.

It is said that myths evolve over time, retaining certain core attributes but possessing a flexibility that permits them to endure.<sup>41</sup> Modern myths replicate age-old myths. Myths that equate women with their maternal bodies are imbedded in history and culture. The process by which these myths are perpetuated and the consequences of their prevalence for women will be examined in the remainder of this Comment.

## II. TRACING THE IMAGES, MAPPING THE THOUGHT PROCESSES

*My thought . . . is to look at a series of cases in the hope that we might learn something experientially, both about the practices they reflect and about our own expectations, as we find them confirmed or upset, concerning the way judges ought to behave. . . .*<sup>42</sup>

This Part considers the involuntary sterilization of women, discusses cases in which women have been ordered by courts not to conceive and analyzes the Norplant measures. By identifying the factors that transcend and unite these contexts and examining the images and rhetoric that surround them, this Part seeks to elucidate the impetus for judicial and legislative invocation of the mother/body myth.

### A. Involuntary Sterilization

Women—particularly those who are poor and of color<sup>43</sup>—have

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attractiveness."); RICH, *supra* note 22, at 149 (noting a semantic link between punishment and reproduction: the Roman's term for labor was "*peona magna*," which means both "great pain" and "punishment, penalty").

41. See BLUMENBURG, *supra* note 4, at 34.

42. James Boyd White, *Constructing a Constitution; "Original Intention" in the Slave Cases*, 47 MD. L. REV. 239, 239, 240 (1987). The passage continues:

My aim is to examine the language of the opinion with a view to asking who the judge makes himself, and his readers, in his writing: who he is as judge, and how he addresses us as citizens and lawyers; how his way of talking to us, and of inviting us in our turn to talk, defines the law in general . . . and how the conversation it seeks to start, or to continue, defines those relations among individuals and institutions that make up our public world.

*Id.* at 240.

43. Mertus and Heller, *supra* note 17, at 377; see also Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, in REPRODUCTIVE LAWS FOR THE 1990S, at 46 (Sherrill Cohen & Nadine Taub eds., 1989) ("At times, poor women and women of color have been subjected to blatant coercion; at other times, their 'choice' of sterilization has been based on inadequate or no informed consent, the effects of poverty, differential government funding schemes, and lack of birth control information.").

been involuntarily sterilized throughout this century.<sup>44</sup> Eugenic sterilization laws directing the sterilization of socially "undesirable" or mentally "unfit" individuals<sup>45</sup> were passed during the early nineteen hundreds<sup>46</sup> and persist in some states today.<sup>47</sup> Eugenic sterilization laws were inspired by the belief that socially undesirable traits were hereditary, and therefore that preventing reproduction would preclude those traits from being passed on.<sup>48</sup> Traits thought capable of intergenerational transmission included not only mental illness or retardation, but also "character traits" such as "dishonesty, criminality, and laziness."<sup>49</sup> Individuals exhibiting these tendencies were classified as "unfit" and sterilized pursuant to the eugenic laws.<sup>50</sup> Many women were sterilized under to such laws.<sup>51</sup>

In addition to being effectuated through eugenic sterilization laws, the sterilization of so-called "incompetent" women has also been accomplished via court orders.<sup>52</sup> Judges have been called upon

44. State programs to involuntarily sterilize institutionalized individuals were active between 1907-1963, particularly in the 1930s. PHILIP R. REILLY, *THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES* 94 (1991). During this period approximately 60,000 people were sterilized pursuant to these programs. *Id.*

45. See generally Elyce Z. Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591 (1966) (tracing the history of sterilization in the United States and its use as an instrument of social policy).

46. The first eugenic sterilization law, authorizing sterilization of "confirmed criminals, idiots, imbeciles, and rapists," was passed in Indiana in 1907. REILLY, *supra* note 44, at 45-46.

47. See generally RUTH HUBBARD, *THE POLITICS OF WOMEN'S BIOLOGY* 183 (1990) (noting that twenty states currently still have compulsory sterilization laws on the books).

48. The term "eugenics" was coined by British intellectual Francis Galton in 1883 and denotes the theory that the human race can be improved if breeding is monitored to eliminate undesirable traits. REILLY, *supra* note 44, at 3. The early American eugenics movement tried to establish a scientific basis for the belief that African-Americans were racially inferior. *Id.* at 5-7. In the late nineteenth and early twentieth centuries, the focus turned to identifying a biological explanation for "feeble-mindedness." *Id.* at 8.

49. Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 809 n.12.

50. See Helen Rodriguez-Trias, *Sterilization Abuse*, in *BIOLOGICAL WOMAN: THE CONVENIENT MYTH* 147 (Ruth Hubbard et al. eds., 1982). The goal of prohibiting the propagation of "unfit" individuals was also sought through laws preventing individuals so classified from marrying, unless the prospective wife was too old to bear children. In 1965, Connecticut was the first state to prohibit any feeble-minded people from marrying, unless the woman was forty-five or more years old. REILLY, *supra* note 44, at 26. Another law criminalized sexual relations between any "pauper" and a woman under age forty-five. *Id.*

51. REILLY, *supra* note 44, at 94-95. Reilly recounts that in some states "only young women were sterilized." *Id.* (emphasis in original).

52. Even when sterilization was provided for by a eugenics statute, the law might require a court to approve a sterilization order. Kathryn A. Calibey, Comment, *Nonconsensual Sterilization of the Mentally Retarded—Analysis of Standards for Judicial Determinations*, 3 W. NEW ENG. L. REV. 689, 693 (1981). In the 1960s, courts began to receive petitions requesting permission to sterilize noninstitutionalized, retarded women.

to review eugenic sterilization laws, approve sterilization petitions and to issue sterilization orders on their own authority. This Section selects the compulsory sterilization case of *In re Simpson*<sup>53</sup> as a paradigm of the mother/body myth.

*Simpson* considered whether to order the sterilization of Nora Ann, an 18 year old<sup>54</sup> with an IQ of 36.<sup>55</sup> After citing Simpson's low I.Q., the court continued:

Nora Ann Simpson is a physically attractive young woman, aged 18. She has already given birth to one illegitimate child and according to the testimony of her mother, and her own admission, she has been sexually promiscuous with a number of young men since the birth of the child. Nora Ann is unable to give her child proper care, and it is being cared for by her mother. A portion of the medical testimony stated: '[b]ecause of the combination of normal physical appearance and serious mental limitations, this girl is likely to become pregnant repeatedly and produce children for whom she cannot provide even the rudiments of maternal care.' There is the further probability that such offspring will also be mentally deficient and become a public charge for most of their lives. Application has been made to the Muskingum County Welfare Department for Aid to Dependent Children payments for the child already born.<sup>56</sup>

The emphasis here is instructive. The court does not analyze Simpson's mental condition. It fails even to discuss her I.Q., the sole evidence offered that pertains to her "feeble-mindedness,"<sup>57</sup> although its authority to order the sterilization derives only from its statutory mandate to supervise the care of "feeble-minded" individuals.<sup>58</sup> Rather than considering Simpson's mind, in other words, the court focuses on Simpson's body.

In ordering Simpson's sterilization, the court appears to find evidence of Simpson's sexuality, reproductive history, and economic status most compelling. Consider the facts the court sets forth and the conclusions it draws from them. After highlighting Simpson's physical appearance and alluding to her sexual self, the court stresses that Simpson is not married, that her child is illegitimate, and that she and her child (and potential future children) pose a burden to the state's welfare system.<sup>59</sup> Made explicit is Simpson's

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REILLY, *supra* note 44, at 149. For a court to order nonconsensual sterilization, specific statutory authorization is usually, but not always required. *Id.* at 154-55; Calibey, *supra*, at 693 n.27.

53. 180 N.E.2d 206 (Ohio P. Ct. Zanesville County 1962).

54. *Id.* at 207.

55. *Id.*

56. *Id.* at 207-08.

57. *Id.* at 207.

58. *Id.*

59. *Id.*

"normal" and "attractive" appearance, and "sexual promiscuity."<sup>60</sup> Implied is that Simpson will be unable or unwilling to resist the overtures of men who will be attracted to her. The court infers that, given these circumstances, Simpson will continually become pregnant and be an increasing burden to society.

How did the court determine which facts were relevant? Did Simpson's perceived inability to "provide even the rudiments of maternal care"<sup>61</sup> mean that she was unable to prevent herself from becoming pregnant, and moreover, that she should irrevocably lose the ability to make reproductive choices? What, for instance, made one "illegitimate" birth evidence of Simpson's incompetence? At least a partial answer to this last question inheres in the way the court looked at the case. In order for the illegitimate birth to constitute evidence of incompetence, the court cast the question of Simpson's competence in terms of her ability to control her (maternal) body. The court's opinion cites Simpson's "feeble" mind to explain her "out-of-control" body, but maneuvers until it can conclude that Simpson's "out-of-control" body indicates the presence of a "feeble" mind.<sup>62</sup>

*Buck v. Bell*,<sup>63</sup> in which the United States Supreme Court upheld Virginia's compulsory sterilization law,<sup>64</sup> is also useful for thinking about which facts courts contemplating sterilization will find determinative. As with Simpson, the ostensible justification for Carrie Buck's institutionalization and subsequent sterilization was her alleged mental deficiency.<sup>65</sup> Yet recent scholarship has revealed

60. *Id.* See Deborah H. Ross, *Sterilization of the Developmentally Disabled: Shedding Some Myth-conceptions*, 9 FLA. ST. U. L. REV. 599, 617-18 (1981) (discussing the myths about the lack of sexual self-control of the "feble-minded").

61. *Simpson*, 180 N.E.2d at 208.

62. The case of *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978), reinforces some of the themes extant in *In re Simpson*. The court in *Downs* noted that Georgia Mae Downs was "a deaf mute mother of two children born out of wedlock." *Id.* One of the physicians testifying at trial stated that Downs "apparently lack[ed] ability to curtail normal appetite for sex," that she was "[p]otentially dangerous," and that her low economic earning power demonstrated "irresponsibility." The second physician's report stated, "uncontrolled appetite leads to promiscuity. Apparently retarded. Incapable of functioning in maternal role." *Id.* at 5.

63. 274 U.S. 200 (1927).

64. Justice Holmes, writing for the majority, found the law to be a legitimate means for curing social ills and lifting the burden placed by certain persons on society as a whole:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence.

*Id.* at 207.

65. Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*,

that Buck was a "normal" child who did well in school<sup>66</sup> and had been institutionalized because she, like her mother before her, gave birth to an illegitimate child.<sup>67</sup> This suggests that beneath the ostensible legal focus on Buck's mental capacity was a tacit awareness that controlling Buck's ability to reproduce had as much to do with her maternal status as her mental status.

Both *Simpson* and *Buck* suggest that factors about a woman's maternal status—evidence of a woman's ability to control her body—have been given weight in sterilization proceedings. *Simpson* and *Buck* also illustrate the coexistence of fact and fiction in myth. It may be "true" that many so-called incompetent women have children out-of-wedlock and that adding children to the welfare rolls depletes states' financial resources. However, the "untruth" of the myth is the "if-then" relationship between incompetence and marital or maternal status: the notion that the presence of one of these facts signals the presence of the others. This raises the question of how often blurring lines between types of "undesirable" behavior can provide implicit justification for judicial outcomes. Such "associational" thinking sustains the mother/body myth: through this reasoning process the court is able to make the link between a woman's mental incompetence and her ability to control her maternal body.

Now consider how the *Simpson* court frames its decision. The court first holds *Simpson* responsible for the circumstances which warrant her sterilization, and then suggests that its decision was in *Simpson*'s best interests. The court paradoxically holds *Simpson* accountable for the lack of responsibility evidenced by her "sexual promiscuity," the combination of her attractive appearance and perceived inability to resist sexual advances. It is her responsibility for her irresponsibility that justifies her sterilization. Finally, and perhaps most ironically, the court ultimately punishes *Simpson* for her irresponsibility by promising to free her of *future* responsibility.

Courts often use the gloss of a woman's "best interests" to shroud their intervention in women's lives. The *Simpson* court concludes by stating: "To *deny* Nora Ann such an operation would be to condemn her to a lifetime of frustration and drudgery, as she continued to bring children into the world for whom she is not capable, either physically or mentally, of providing proper care."<sup>68</sup> The

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60 N.Y.U. L. REV. 30, 52 (1985).

66. *Id.* at 52.

67. *Id.* at 53. Carrie Buck's pregnancy was the result of rape. *Id.* at 54. Philip Reilly reports that "young women who were at most mildly retarded were often admitted [to institutions] for the sole purpose of being sterilized." REILLY, *supra* note 44, at 98-99.

68. 180 N.E.2d at 208 (emphasis added). Again evident is the court's sense that *Simpson* is bound to be "perpetually pregnant" if she is not sterilized. See STELLMAN, *supra* note 22, at 179.

court's final words are that sterilization is "necessary for the health and welfare of said Nora Ann Simpson,"<sup>69</sup> yet the fact that it has spent much of the opinion addressing the shortage of welfare funds and social services indicates where its true concern lies.

Similarly, courts at times stress that the woman affected has chosen the intervention or agreed that it was in her best interests. *In re Cavitt*,<sup>70</sup> for instance, upheld the constitutionality of a statute requiring institutionalized mentally retarded persons to be sterilized prior to their discharge.<sup>71</sup> The court reasoned that Gloria Cavitt could avoid sterilization by choosing to remain institutionalized.<sup>72</sup> The notion that women in such situations are free to choose their procreative fate becomes a powerful rhetorical tool for courts and legislators: the reality of constraint is carefully hidden in the language of liberty.<sup>73</sup>

This Section now turns to legislation proposed in the middle of this century, which would have required single mothers on welfare to be sterilized as a precondition to receiving further benefits.<sup>74</sup> These initiatives are informed by the same assumptions and myths about women that were evident in the involuntary sterilization cases.

One proposed bill provided that any woman who gave birth to more than two illegitimate children would be convicted of a crime punishable by a fine, up to three years imprisonment, or both.<sup>75</sup> The woman would then be "declared morally unfit for the care, custody and control of any of her existing children," her children would be placed in permanent state custody and she would be sterilized.<sup>76</sup> The State Senator who introduced the bill explained: "When you have a

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69. 180 N.E.2d at 208.

70. 157 N.W.2d 171 (Neb. 1968).

71. *Id.* at 174.

72. *Id.* at 178. The Nebraska legislature repealed the law at its next session. REILLY, *supra* note 44, at 149.

73. The dissenting judge objected to the majority's characterization of Cavitt's choice, noting that the statute's "coercive feature is hardly masked by the fictive option of sterilization or life imprisonment." *Cavitt*, 157 N.W.2d at 179.

74. According to one source, California, Delaware, Georgia, Illinois, Iowa, Louisiana, Maryland, Mississippi, North Carolina and Virginia all "evidenced various degrees of interest in punitive sterilization." Julius Paul, *The Return of Punitive Sterilization Proposals*, 3 LAW & SOC'Y REV. 77, 79 (1968). These proposals were "aimed particularly at the mothers . . . of illegitimate children, especially those receiving help from the Aid to Families with Dependent Children program (AFDC)." *Id.* at 78. *See also* Mertus & Heller, *supra* note 17, at 380 (citing NATIONAL WOMEN'S HEALTH NETWORK, *STERILIZATION ABUSE: WHAT IT IS AND HOW IT CAN BE CONTROLLED* 5-6 (1981)); REILLY, *supra* note 44, at 160-61.

75. Paul, *supra* note 74, at 84. This bill was introduced in the Maryland Senate in 1960.

76. *Id.* at 84-85. This measure passed the Maryland Senate by a vote of 23 to 3.



woman who has seven or eight illegitimate children and she keeps on having them at the expense of the taxpayers it's time to do something about it."<sup>77</sup>

A bill introduced into the Mississippi House of Representatives in 1958 was entitled "An Act to Discourage Immorality of Unmarried Females by Providing for Sterilization of the Unwed Mother Under Conditions of this Act; And for Related Purposes."<sup>78</sup> The Representative who authored that bill explained that, "[t]he negro woman, because of child welfare assistance, [is] making it a business, in some cases of giving birth to illegitimate children . . . . The purpose of my bill was to try to stop, or slow down, such traffic at its source."<sup>79</sup>

These bills linking reproduction and welfare epitomize the mother/body myth. The title of the Mississippi bill draws on mother/body myth rhetoric, employing words such as "immorality" and "unmarried." The bills portray women as "unfit" and "perpetually pregnant" and also as culpable—their crime is burdening taxpayers. These bills were more overtly punitive than the eugenic sterilization cases, and lacked the rhetoric of being in the woman's best interests; perhaps their lack of subtlety explains why they were ultimately unsuccessful.

While the bills tying reproduction to welfare were not adopted, other measures, cast differently, have been accepted. Incentive schemes which induce women to undergo involuntary sterilizations or curtail their reproduction have become accepted policy practice. Incentive schemes designed to promote sterilization or contraception have, for example, been employed in the population control context.<sup>80</sup> Agencies seeking to stem population growth in some countries have supported the use of incentives or compensation payments.<sup>81</sup>

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77. *Id.* at 85-86 n.12 (quoting WASH. STAR, Feb. 12, 1960). Compare this with Kerry Patrick's justification of his bill offering financial incentives to women on welfare if they would consent to implantation with Norplant, introduced 31 years later. See *infra* text accompanying note 312.

78. Paul, *supra* note 74, at 88.

79. *Id.* at 89.

80. See BETSY HARTMANN, REPRODUCTIVE RIGHTS AND WRONGS 65-73 (1987) (discussing the debate over the propriety of offering incentives to encourage behavior modification). Incentives in the form of payments are most often made to family planning practitioners to encourage sterilization or the provision of contraceptives to their patients, but incentives are sometimes made directly to individuals. *Id.* at 66 (A table on that page cites statistics from 1983 documenting that ten countries offer incentives to individuals to be sterilized and that nine countries offer incentives for contraceptive use by individuals.). Other forms of incentives include community incentives and government sponsored incentives. *Id.* at 68-69.

81. *Id.* at 213-20. As with all the measures discussed herein, incentive schemes also most often disadvantage poor people. See, e.g., *id.* at 65-66, 71-72, 213-15.

Similarly, welfare reformers in the United States have proposed incentive schemes to modify welfare recipients' childbearing activity.<sup>82</sup> Underlying such measures is the message: If you are not being a productive member of society at least control yourself and stop having so many children.<sup>83</sup>

Finally, involuntary sterilizations have been effectuated through informal means. Women have been involuntarily sterilized in private doctors' offices and in public clinics, where sterilizations have sometimes been encouraged by federal family planning programs.<sup>84</sup> The possibility of coercion and abuse of authority even in such ostensibly voluntary contexts is great. Women undergoing surgical procedures have been sterilized without their knowledge or consent.<sup>85</sup> Welfare workers or doctors have threatened women with withholding public assistance until they have agreed to sterilization.<sup>86</sup> Not surprisingly, as with the other measures, women who are poor, single and of color have most often been affected, again revealing that across contexts similar factors and assumptions engender and enable the reproductive control of women.<sup>87</sup>

82. See Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992) (outlining the historical context for welfare measures designed to modify recipients' behavior in order to reduce the welfare rolls, and describing two such measures). The fact that these incentive policies may be more subtly worded than the language in the sterilization cases or in the proposed legislative measures targeting AFDC recipients for sterilization may account for their comparative legislative success.

83. See *id.* at 746.

84. The court in *Relf v. Weinberger*, 372 F. Supp. 1196 (D.D.C. 1974), striking down certain portions of federally funded sterilization laws, noted that poor women were often coerced into undergoing sterilization procedures:

Although Congress has been insistent that all family planning programs function on a purely voluntary basis there is uncontroverted evidence in the record that minors and other incompetents have been sterilized with federal funds and that an indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn unless they submitted to irreversible sterilization. Patients receiving medicaid assistance at childbirth are evidently the most frequent targets of this pressure. . . . Mrs. Waters was actually refused medical assistance by her attending physician unless she submitted to a tubal ligation after the birth.

*Id.* at 1199.

85. See Edward J. Spriggs, Jr., Note, *Involuntary Sterilization: An Unconstitutional Menace to Minorities and the Poor*, 4 N.Y.U. REV. L & SOC. CHANGE 127, 132 n.45 (1974).

86. *Id.* at 131-32.

87. See, e.g., Nsiah-Jefferson, *supra* note 43, at 23, 46-48 (offering evidence and examples of different forms of sterilization abuse of women of color and poor women); Williams, *supra* note 35, at 7-8 n.5; Mertus & Heller, *supra* note 17, at 377 (citing John P. Radford, *Sterilization Versus Segregation: Control of the "Feeble-minded," 1900-1938*, 33 SOC. SCI. MED. 449 (1991)); Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1301 n.94 (1991). See also HARTMANN, *supra* note 80, at 240

This Section briefly reviewed judicial, legislative and private attempts and successes in involuntarily sterilizing women. Despite the temporal and qualitative distinctions between these contexts, several factors unite them. The vast majority of the individuals affected are women, and most are members of a marginalized class. In addition, the substantive conclusions of law and legislative rationales often rest on imagery of and assumptions about marital status and maternal responsibility. Finally, a woman's reproductive body is the means through which other social goals are realized; barring procreation purportedly serves not only the woman herself but also society, by eliminating the "feeble-minded" and "immoral" and easing welfare burdens. In reflecting on the cases presented in Sections II.B and II.C, consider whether the real social goal is not rather reproductive control itself. Consider how often courts faced with an issue not initially defined as one of maternal status, use maternal status to redefine the issue and propel the maternal body to center stage.

### B. *Court-Ordered Contraception*

Through probation conditions and plea agreements, courts have ordered individuals not to conceive, to use birth control or to undergo sterilization as punishment for crimes.<sup>88</sup> These judgments

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(noting that the limited birth control options of "poor white, black, Hispanic, and Native American women . . . was further restricted in 1977 when public funding of abortion was virtually eliminated, although sterilization continues to be covered in Medicaid programs for up to 90 percent of the cost.").

88. My research disclosed sixteen such cases, in addition to the eight cases which have involved Norplant (see *infra* notes 186-89 for cases involving Norplant). In ten of the cases in which trial courts prohibited probationers from getting pregnant, appellate courts invalidated the probation condition. *People v. Zaring*, 8 Cal. App. 4th 362 (Ct. App. 1992) (woman convicted of drug possession ordered not to get pregnant as condition of probation); *People v. Pointer*, 151 Cal. App. 3d 1128 (Ct. App. 1st Dist. 1984) (woman in child neglect case ordered not to conceive during five year probation term); *People v. Dominguez*, 256 Cal. App. 2d 623 (Ct. App. 1967) (woman robber ordered not to get pregnant until married as probation condition); *In re Hernandez*, see Ferster, *supra* note 45, at 611 (woman "knowingly present in room where narcotics were smoked" offered sterilization as a condition of probation); *Thomas v. State*, 519 So.2d 1113 (Fla. Dist. Ct. App. 1988) (woman convicted of stealing ordered not to get pregnant as condition of probation); *Wiggins v. State*, 386 So.2d 46 (Fla. Dist. Ct. App. 1980) (woman convicted of robbery/forgery ordered not to have sex until married as condition of probation); *State v. Mosburg*, 768 P.2d 313 (Kan. Ct. App. 1989) (woman charged with abandoning her child ordered not to get pregnant as a probation condition); *State v. Norman*, 484 So.2d 952 (La. Ct. App. 1986) (woman convicted of forgery ordered not to give birth to any illegitimate children as a condition of probation); *Rodriguez v. State*, 378 So.2d 7 (Fla. Dist. Ct. App. 1979) (woman charged with child abuse prohibited from marrying or becoming pregnant for ten year probation period); *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976) (woman charged with child abuse ordered not to have children as a

predominantly affect women, sometimes men,<sup>89</sup> and in at least one instance has involved a couple.<sup>90</sup> The women subjected to these

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condition of probation).

Several additional cases came to my attention through secondary sources; as far as I am aware, none of these orders were appealed. These include the cases of: Tracy Wilder, see Felicity Barringer, *Sentence for Killing Newborn: Jail Term, Then Birth Control*, N.Y. TIMES, Nov. 18, 1990, at 1 (Florida woman charged in death of child sentenced to ten years probation with birth control); Melody Baldwin, see *10-Year Term Imposed Despite Sterilization*, CHI. TRIB., Nov. 11, 1988, at 3 (Indiana woman pled guilty to felony child neglect and agreed to undergo sterilization as part of plea agreement); Debra Forster, see *Woman's Sentence is Birth Control*, N.Y. TIMES, May 26, 1988, at A22 (Arizona woman charged with child neglect ordered to use birth control for life); Melinda Middleton, see *Convicted Child Abuser Undergoes Court-Suggested Sterilization*, UPI, Nov. 19, 1981, available in LEXIS, Nexis Library, UPI File (California woman convicted of child abuse agreed to sterilization as an alternative to prison sentence); Helen James, see Anna Lowenhaupt Tsing, *Monster Stories: Women Charged with Perinatal Endangerment in UNCERTAIN TERMS: NEGOTIATING GENDER IN AMERICAN CULTURE* 282, 295 (Faye Ginsburg & Anna Lowenhaupt Tsing eds., 1990) (woman charged with attempted murder ordered to undergo mandatory pregnancy testing every six months for ten years); Debra Ann Williams, see Jef Feeley, NAT'L L.J., Aug. 18, 1986, at 61 (South Carolina woman charged with murder was allowed to plead to manslaughter when she agreed to be sterilized).

For discussions of court-ordered birth control, see Jack P. Lipton & Colin F. Campbell, *The Constitutionality of Court-Imposed Birth Control as a Condition of Probation*, 6 N.Y.L. SCH. J. HUM. RTS. 271 (1989); Elinor F. Parker, Note, *Birth Control as a Probation Condition for Child Abusers—Creative Alternative or Unconstitutional Condition?* 19 W. ST. U. L. REV. 289 (1991). See also Colleen M. Coyle, Note, *Sterilization: A 'Remedy for the Malady' of Child Abuse?*, 5 J. CONTEMP. HEALTH L. & POL'Y 245 (1989) (describing the case of Debra Ann Williams and arguing that court orders of sterilization for child abusers is inappropriately punitive); Stephanie B. Goldberg, *No Baby, No Jail*, A.B.A. J., Oct. 1992, at 90 (discussing *People v. Zaring*, 8 Cal. App.4th 362 (Ct. App. 1992), which struck down a probation condition prohibiting pregnancy); *Marriage or Else!*, NAT'L L.J., May 9, 1983, at 39 (Minnesota judge imposes probation conditions requiring defendants to stop cohabitating with members of the opposite sex, to marry, or else to go to jail).

89. Michael Howland, convicted of negligent child abuse, was ordered not to father any children during his five year term of probation. *Howland v. State*, 420 So.2d 918 (Fla. Dist. Ct. App. 1982). The court struck down this condition as not "reasonably related" to the crime of child abuse. *Id.* The court further reasoned that the condition was unnecessary because Howland had already been ordered by other conditions of probation not to have contact with any children under the age of sixteen. *Id.* at 920. Darrell Mays pled guilty to burglary and as one of the conditions of his probation was ordered not to live with members of the opposite sex unless married. The court directed that this order be modified; it was overbroad as it stood because it would prevent him from living with any female relative. *Mays v. State*, 349 So.2d at 794 (Fla. Dist. Ct. App. 1977). Edward Michalow was directed, as a condition of probation, to "rectify his marital situation and to make his child 'legitimate' within one year." *Michalow v. State*, 362 So.2d 456, 457 (Fla. Dist. Ct. App. 1978). That condition—one essentially requiring that he marry the mother of his child—was found to exceed the trial court's discretion. *Id.*

90. *Smith v. Superior Court*, 725 P.2d 1101 (Ariz. 1986) (striking trial court's order offering a lesser sentence to a couple convicted of child abuse on the condition that they be sterilized).

orders committed crimes ranging from child abuse,<sup>91</sup> to drug use,<sup>92</sup> to stealing.<sup>93</sup> Probation orders prohibiting procreation again betray judicial preoccupation with the maternal body, signaling the need to map the processes which underlie them.

The following are glimpses of cases in which courts have ordered contraceptive use by women who have abused their children.<sup>94</sup> Seventeen year-old Tracy Wilder pled guilty to manslaughter for the suffocation of her newborn daughter.<sup>95</sup> Wilder, who claimed that she was unaware that she was pregnant, was driven to the hospital after she began bleeding and experiencing abdominal pain.<sup>96</sup> She gave birth in a hospital bathroom, wrapped the infant in plastic and placed her in a garbage can.<sup>97</sup> Wilder was sentenced to two years in jail and ten years probation with birth control.<sup>98</sup> Had she not agreed to the probation condition, she could have received a sentence of twelve to twenty-two years in prison.<sup>99</sup> Debra Forster, also seventeen, was sentenced to lifetime use of birth control when she pled guilty to child neglect<sup>100</sup> for leaving her infant sons alone for two days in a hot apartment.<sup>101</sup>

In at least three instances, women have been offered the option of undergoing sterilization in return for a reduced charge or sentence. Melody Baldwin, a thirty year-old Indiana woman, consented to sterilization as part of a plea agreement in 1988.<sup>102</sup> Baldwin pled guilty to felony child neglect in connection with the death of her four year-old son who died of an overdose of psychiatric drugs.<sup>103</sup> Twenty-

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91. See, e.g., *People v. Pointer*, 151 Cal. App.3d 1128 (Ct. App. 1st Dist. 1989).

92. See, e.g., *People v. Zaring*, 8 Cal. App.4th 362 (Ct. App. 1992).

93. See, e.g., *Thomas v. State*, 519 So.2d 1113 (Fla. Dist. Ct. App. 1988).

94. I reiterate that much of my information is gleaned from media coverage of these cases. Hence it should be kept in mind that I am presenting the "facts" reporters selected in weaving their stories.

95. Barringer, *supra* note 88, at 1. The case was presided over by Judge Lawrence Page Haddock of Duval County Circuit Court, Florida. *Id.*

96. *Id.* at 33. Sometimes women are convicted of crimes of child neglect when, unaware or denying that they are pregnant, they deliver without preparation and with no prenatal care. This ignorance of one's pregnancy—failure to be fully consumed by one's maternal body—has frequently contributed to the construction of the "bad mother." See generally Tsing, *supra* note 88.

97. Barringer, *supra* note 88, at 33. Helen James, by contrast, gave birth in a hospital toilet and the infant was revived by nurses. James was charged anyway. See Tsing, *supra* note 88, at 282.

98. Barringer, *supra* note 88, at 1. The type of birth control was not specified. See *id.*

99. *Id.* at 33.

100. *Id.* Forster became pregnant several months later thus Judge Lindsay Ellis Budzyn deleted the birth control requirements as unenforceable. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

six year old Debra Ann Williams was charged with murder for allowing her three month old son to starve to death.<sup>104</sup> Williams consented to sterilization in return for being allowed to plead guilty to the lesser crime of manslaughter.<sup>105</sup> Melinda Middleton pled guilty to child abuse for her role in causing the death of her infant, who suffered from whiplash injuries and malnutrition.<sup>106</sup> At the court's behest, Middleton agreed to be sterilized as a condition of probation rather than serve a three year prison term.<sup>107</sup>

Judge Jensen, the presiding judge in Middleton's case, stated that he wanted the District Attorney's office to investigate the possibility of sterilization as a probation condition: "It's an extremely shocking case, a revolting one, and I want to look into extreme possibilities."<sup>108</sup> Before sentencing, the judge learned that Middleton was pregnant again, and considered requiring her to have an abortion as a probation condition.<sup>109</sup> The judge stated that, although he opposed abortion, "*these people* just shouldn't have children."<sup>110</sup> Although Judge Jensen's phrase, "these people," could logically refer to Middleton and her husband, the judge only meted out reproductive punishment to the mother.<sup>111</sup> More broadly, "these people" might have denoted the larger group of women "like" Middleton: women who are poor, unwed, and perceived as irresponsible—women, in other words, the State should prevent from having children.

In contrast to the eugenic sterilization cases, in which the evil sought to be addressed was, at least nominally, reproduction, the crimes courts punish by mandating contraceptive use less obviously implicate reproduction. There is a greater divide between reproduction and the harm sought to be prevented and remedied. From this perspective, punishing child abusers by prohibiting pregnancy is entirely misdirected: it punishes women for their procreative con-

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104. Feeley, *supra* note 88, at 61.

105. *Id.*

106. *Convicted Child Abuser Undergoes Court-Suggested Sterilization*, *supra* note 88.

107. *Id.* Her attorney apparently informed Middleton that "sterilization is questionable under state law," but, he said, "she just doesn't want anymore [sic] children." *Id.*

108. *Judge Asks if Sterilization Can be Condition of Probation*, UPI, June 27, 1981, available in, LEXIS, Nexis Library, UPI File.

109. *Id.*

110. *Id.* (emphasis added). Middleton ultimately gave birth to this child, and a petition was filed to make the child a ward of the court. *Convicted Child Abuser Undergoes Court-Suggested Sterilization*, *supra* note 88.

111. Middleton's husband was convicted on a misdemeanor count in relation to the case and was sentenced to probation; apparently no probation conditions related to procreation were imposed upon him. *Convicted Child Abuser Undergoes Court-Suggested Sterilization*, *supra* note 88.

duct, not their criminal conduct.<sup>112</sup> However, from another perspective—the perspective, perhaps, of the judges who issue these probation conditions—punishing the maternal body *does* strike at the root of the problem.<sup>113</sup>

The court-ordered contraception cases do resemble the eugenic and compulsory sterilization cases, however, in that each of these cases suggest some other factor, a more obvious focus, that could have, and arguably should have, been central to the courts' decisions. For instance, courts reviewing an eugenic or compulsory sterilization order could engage in a narrower inquiry than the *Simpson* court did, by limiting themselves to an inquiry into "feble-mindedness" or "incompetence." Of course, the *Simpson* court might respond by saying that its review of the facts *was* designed to assess Simpson's feble-mindedness. Similarly, judges designing probation conditions for child abusers could consider only their criminal conduct. These judges might also respond that all evidence of bad mothering is relevant to determining an appropriate sanction, and again, the disagreement would be over whether the facts relied upon truly indicate bad mothering. When courts shift their focus from the "presenting problem" to the maternal body, it suggests that they have implicitly redefined the presenting problem as one that directly implicates reproduction. This shift in focus broadens the range of facts courts can deem relevant.

It becomes pertinent at this point to briefly address the legal standard state appellate courts have used when reviewing and striking down probation conditions prohibiting reproduction.<sup>114</sup> These courts have applied the *Dominguez/Lent* test for determining whether a condition of probation is valid.<sup>115</sup> Under this "reasonableness" test,

[a] condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably

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112. Such reproductive sanctions convey the message that childbearing by certain women in certain contexts *is* criminal conduct. Indeed, were a woman to violate a probation order by getting pregnant, conception would become, in essence, a criminal act.

113. It is interesting that in the cases in which men have been ordered not to procreate, even where the man was a child abuser, the reviewing courts seemed to have a much easier time finding that there was no relationship between the probation condition and the crime. See cases cited *supra* note 89.

114. See cases cited *supra* note 88. For a discussion of the legal validity of probation conditions prohibiting pregnancy, see Parker, *supra* note 88, Lipton & Campbell, *supra* note 88 and Arthur, *supra* note 17.

115. *People v. Dominguez*, 256 Cal. App. 2d 623, 627 (Ct. App. 1967). The tests applied by other state courts reviewing probation conditions prohibiting pregnancy conditions are identical or substantially the same. See, e.g., *State v. Livingston*, 372 N.E.2d 1335, 1337 (Ohio Ct. App. 1976).

related to future criminality does not serve the statutory ends of probation and is invalid.<sup>116</sup>

Thus, on its face, this is a test for determining relevancy. The *Dominguez/Lent* standard was applied by the California Court of Appeals in *People v. Pointer*,<sup>117</sup> in which a woman who had been found guilty of felony child endangerment successfully challenged an order barring her from conceiving for the duration of her five year probationary term.<sup>118</sup> The appellate court reversed the part of the trial court's order directing Pointer not to conceive while on probation. The *Pointer* court found, however, that it could "not say that the condition of probation prohibiting conception [was] completely unrelated to the crime" of felony child endangerment.<sup>119</sup> The court held that the pregnancy prohibition impermissibly impinged on Pointer's exercise of her fundamental constitutional right to procreate.<sup>120</sup>

The *Dominguez/Lent* standard is meant to prevent "unrelated" considerations from influencing probation conditions.<sup>121</sup> As discussed above, what is perceived and presented as "related" will in large part be determined by the judge's view of the case and will be reflected in the judicial casting of the opinion. The next group of cases to be

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116. *Dominguez*, 256 Cal. App. 2d at 627.

117. 151 Cal. App.3d 1128 (Ct. App. 1st Dist. 1984).

118. *Id.* at 1133. Pointer adhered to a strict macrobiotic diet and only fed macrobiotic foods to her children. *Id.* at 1131. Her infant suffered from severe malnourishment. *Id.* at 1132. Pointer would not modify her son's diet, and he eventually became semi-comatose and required hospitalization. *Id.*

119. *Id.* at 1138-39.

120. *Id.* at 1139-40. The court also found that more narrowly tailored means to achieve the same ends were available, suggesting periodic pregnancy testing and the possibility of removing Pointer's children from custody at birth as narrower alternatives. *Id.* at 1140.

121. In several instances, appellate courts admonished the trial judge for interjecting extra-legal considerations into the sentencing decision. *See, e.g., People v. Dominguez*, 256 Cal. App. 2d 623, 628 (Ct. App. 1967) and *People v. Zaring*, 8 Cal. App. 4th 362, 374 (Ct. App. 1992).

Some of the cases that have reversed probation conditions forbidding procreation have done so because of the lack of statutory authority permitting them. *See, e.g., Zaring*, 8 Cal. App. 4th at 374 ("In our view, the morality of having children while on public assistance, and the imposing of any constitutionally permissible legal deterrents to such a practice, are matters properly left to the . . . legislature."); *Smith v. Superior Court*, 725 P.2d 1101 (Ariz. 1986) (noting that the majority view is that sterilization should not be permitted absent specific statutory authorization and that only one criminal case—*People v. Blankenship*, 61 P.2d 352 (Cal. Dist. Ct. App. 1936)—has upheld sterilization absent such authority.) This raises the question of whether judges are trying (or succeeding, without consciously trying) to achieve via the judiciary what has not been able to be realized through the legislatures. *See Coyle, supra* note 88, at 260, 261 (noting that "prosecutors, through plea negotiations, have avoided the constitutional challenge by encouraging the willing child abuse defendant to bargain his/her reproductive rights.").



considered make this clear.

Several courts have ordered contraception for women whose crimes are seemingly unrelated to mothering, such as forgery<sup>122</sup> or robbery.<sup>123</sup> Such cases further illuminate both the underlying dynamic of court-ordered contraception cases and the ways in which these cases fit into the involuntary sterilization cases discussed in the last Section, and the Norplant measures to be discussed in the next Section.

*In re Hernandez*<sup>124</sup> represents perhaps the most shocking instance of a punishment not fitting the crime. The court ordered a woman's sterilization as punishment for a minor crime unrelated to child care. In 1966, twenty-one year-old Nancy Hernandez was offered the choice between sterilization and probation or the maximum penalty for her offense, six months in jail.<sup>125</sup> Hernandez's crime was knowingly being present in a room where narcotics were used.<sup>126</sup> The court stated: "[T]his woman is in danger of continuing to lead a dissolute life and to be endangering the health, safety and lives of her minor children."<sup>127</sup> Hernandez had a child out-of-wedlock,<sup>128</sup> and both she and the child received public assistance.<sup>129</sup> Although the sterilization provision was stricken by a higher court, even that court devoted "almost half [its] opinion . . . to the problem of public support of illegitimate children and their mothers."<sup>130</sup>

Hernandez's crime of being in the wrong place at the wrong time led to generalizations about her moral character, which in turn became the basis for declaring her an unfit parent. And even though there were neither allegations nor evidence of Hernandez's mistreatment of her children, the judge felt that presenting Hernandez with the choice of sterilization or jail (without addressing whether there was any non-conjectural evidence that she posed a threat to her children) was appropriate.

*People v. Zaring*<sup>131</sup> illustrates the same judicial movement. Linda Gail Zaring pled guilty to drug possession.<sup>132</sup> While no evidence suggested that Zaring's children ever had any drug-related

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122. *State v. Norman*, 484 So.2d 952 (La. App. 1st Cir. 1986).

123. *Thomas v. State*, 591 So.2d 1113 (Fla. App. 1st Dist. 1988).

124. See Ferster, *supra* note 45, at 611 (citing *In Re Hernandez*, No. 76757 (Cal. Super. Ct. Santa Barbara County June 8, 1966)).

125. *Id.*

126. *Id.*

127. *Id.* at 611-12 (citing WASH. POST, May 25, 1966, at A9).

128. *Id.* at 612.

129. *Id.* at 611.

130. *Id.* at 612.

131. *People v. Zaring*, 8 Cal. App. 4th 362 (Ct. App. 1992).

132. *Id.* at 364.

ailments,<sup>133</sup> Judge Broadman, who also sentenced Darlene Johnson to Norplant,<sup>134</sup> reprimanded Zaring as follows:

'You are . . . ordered not to get pregnant during the term as condition of your probation which is a term of five years. . . . I want make [sic] to make it clear that one of the reasons I am making this order is you've got five children. You're thirty years old. None of your children are in your custody or control. Two of them on AFDC. And I'm afraid that if you get pregnant we're going to get a cocaine or heroin addicted baby.'<sup>135</sup>

How did the court turn from punishing drug possession to ordering contraceptive use?<sup>136</sup> Operative here is the "burden on the welfare roll" rationale which emerged in the involuntary sterilization cases. Judge Broadman's decision to inhibit Zaring's ability to procreate conveys the message that Zaring's arguable lack of fiscal responsibility could be remedied by reproductive control. *Zaring* also introduces a new strand of judicial thought; maternal irresponsibility is perceived to begin prenatally. *Zaring's* focus on the maternal body as the site for curing the woman, regardless of her ailment, is the essence of the mother/body myth.

Judge Broadman's statement in *Zaring* is almost identical to remarks made by a judge over two decades ago. In *People v. Dominguez*,<sup>137</sup> the defendant was found guilty of robbing a liquor store.<sup>138</sup> She was twenty years old, had never been married, had two young children and was pregnant.<sup>139</sup> She had received public assistance since the birth of her first child.<sup>140</sup> Dominguez was sentenced to probation with the following condition:

133. *Id.* at 371.

134. For a discussion of the *Johnson* case, see section II.C.2.b, *infra*.

135. *Zaring*, 8 Cal. App. 4th at 368 (quoting Broadman, J.).

136. The appellate court reviewing and reversing Judge Broadman's order stated: In the instant case, the crime of possession of heroin in and of itself does not appear to have any relationship to children born or unborn. The crime was not against a child, it did not endanger a child, and precluding pregnancy has no readily perceivable effect on rehabilitation as that concept is interpreted in the law. It is now widely believed that a pregnant woman can expose a fetus to danger by ingesting certain drugs during pregnancy, and we think that such an endangerment would be deplorable, but we are constrained by our oath to refrain from imposing our personal views on people brought before the bench.

*Id.* at 372. It should be noted that the court repeatedly stressed that it did not decide whether the trial court's no pregnancy order had a sufficient relationship to the crime to satisfy the test for a valid condition of probation. *Id.* at 371, 373, 375.

137. 256 Cal. App. 2d 623 (Ct. App. 1967). Recall that this was the case that established, along with *People v. Lent*, the standard for assessing the validity of probation conditions that governs many of these cases. See *supra* text accompanying note 116.

138. *Dominguez*, 256 Cal. App. at 625.

139. *Id.*

140. *Id.*

'[Y]ou are not to live with any man until after you become married and you are not to become pregnant until after you become married. Now this will develop just by becoming pregnant. You are going to prison unless you are married first. You already have too many of those. Do you understand that [sic] I am saying?'<sup>141</sup>

The court continued to berate Dominguez: "If you insist on this kind of conduct you can at least consider the other people in society who are taking care of your children. You have had too many that [sic] some others are taking care of other than you and the father."<sup>142</sup> Although there was no evidence that Dominguez treated her children inadequately, the court found her "irresponsible"<sup>143</sup> for burdening society with her children on public assistance, and stated that this behavior justified the probation condition.<sup>144</sup>

In addition to Dominguez and Hernandez, Christine Thomas<sup>145</sup> was convicted of "grand theft and battery"<sup>146</sup> and sentenced to probation with the condition that she not get pregnant unless she was married.<sup>147</sup> Savitri Norman<sup>148</sup> was convicted of forgery and ordered not to conceive as long as she remained unmarried. The trial court in *Norman*, like the *Dominquez* court, "characterized giving birth to illegitimate children as evidence of 'irresponsible thinking.'"<sup>149</sup>

This equation of single motherhood with maternal "irresponsibility" immediately recalls *In re Simpson*.<sup>150</sup> The *Simpson* court deduces Simpson's incompetence from her "sexual promiscuity" and illegitimate child—evidence of her lack of self-control. *Norman* also ultimately draws a conclusion about Norman's mental state (her irresponsibility) from facts it construes as illuminating her inability to regulate her own body. The *Norman* court apparently feels that without the aid of externally imposed control, Norman might further offend society by bearing children out-of-wedlock.

These cases seem to offer new and shifting definitions of incompetence. When courts perceive that a woman cannot adequately control her reproduction and that she needs externally imposed control, they seek a factual basis to support a finding of "incompetence"

141. *Id.*

142. *Id.*

143. *Id.* at 626.

144. *Id.*

145. *Thomas v. State*, 519 So.2d 1113 (Fla. App. 1st Dist. 1988).

146. *Id.* at 1114. She had stolen six gold metal watches, and then struggled with a store employee and customer who tried to stop her from fleeing. *Id.*

147. *Id.* *State v. Norman*, 484 So.2d 952, 953 (La. App. 1st Cir. 1986) points out that such a probation condition serves to "require[] marriage, forbid[] extramarital sex, or mandate[] contraception."

148. *Norman*, 484 So.2d at 952.

149. *Id.* at 953.

150. *See supra* notes 53-69 and accompanying text.

that will justify that control. *Simpson*, and incompetence by virtue of mental weakness and sexual promiscuity, represent one point on a continuum of judicial notions of maternal responsibility. *Dominguez*, *Norman*, and lack of control evidenced by maternal irresponsibility, occupy another point. All the cases involving unwed mothers and incompetence by virtue of immorality occupy another such point. Finally, bearing children out-of-wedlock and incompetence by virtue of fiscal irresponsibility, occupies yet another.

The theme of the single-mother-of-illegitimate-children<sup>151</sup> recurs in these cases. Court orders prohibiting pregnancy, whether aimed at a woman who has abused her child, or at a woman charged with a crime unrelated to child abuse, illustrate that the issues of a woman's marital status and whether or not she and her children receive public assistance are continually intertwined with concerns about women's mothering.<sup>152</sup> Fourteen of the sixteen women identified as having been subjected to probation conditions barring procreation were unmarried.<sup>153</sup>

Judicial focus on single motherhood is an essential predicate to the creation and perpetuation of the mother/body myth. The single mother raises judicial ire, and yet fathers' absences are not explicitly addressed by the courts. The lack of a restraining male influence

151. Martha Fineman observes that, rather than targeting the root problem—poverty—social reform efforts have targeted family structure. Such efforts seek to attach a man to each single woman as a solution to the problem. Martha Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L. REV. 274. Fineman writes:

The imagery of welfare discourse . . . remains laden with moral and normative judgments that are founded upon stereotypical assumptions about single mothers in the poverty context. The decisions to become or remain a single mother, particularly when undertaken by a woman who has never been married, is the decisive issue for whether one is to be considered a good mother.

*Id.* at 281-82.

Clarice Feinman notes that single women have historically been treated differently than married women for child abuse related crimes. Historically, married women and single women have been punished differently for crimes against their children. For instance, in thirteenth and fourteenth century England, women accused of infanticide, if married and living with their husbands, were rarely punished by more than a public reprimand. By contrast, if a woman were unmarried, she might be accused of being a witch and be stoned to death or buried alive. See CLARICE FEINMAN, *WOMEN IN THE CRIMINAL JUSTICE SYSTEM* 5 (2nd ed. 1986).

152. One woman, jailed after violating her probation condition that she not give birth to an illegitimate child, was reprimanded by the sentencing judge for "continu[ing] to bring into life these unfortunate children without the benefit of a legal father." Paul, *supra* note 74, at 86 n.14. The sentencing judge called the violation of probation "vicious in its nature." *Id.*

153. See *supra* note 88. The exceptions are Melinda Middleton and Debra Ann Williams. See *Convicted Child Abuser Undergoes Court-Suggested Sterilization*, *supra* note 88 (noting that Middleton is married); Feeley, *supra* note 88, at 61 (noting that Williams is married).

seems to incite the court's impulse to subject women to extra measures of control. The courts appear to reason that because women need assistance in controlling their bodies, and no husband/father is performing that function, the State must intervene. In this situation, the court itself assumes the parental role.

Cases such as *Zaring*, *Dominguez*, and *Hernandez*, where women were ordered not to conceive because of crimes with no apparent connection to the care of children, rely especially heavily on the spectre of the "bad mother" and the mother/body myth for their coherence. Single mothers and children born out-of-wedlock appear to conjure up judicial visions of "bad mothers." A judge can thus react to "facts" neither directly at issue nor criminally punishable, such as a woman's maternal status, but incorporate those facts into his or her view of the "bad mother" who is seen by some as an appropriate target for reproductive control. The tenet of the mother/body myth that all women's ills can be cured through imposition of reproductive controls then comes into play.

The myths surrounding judicial efforts to control the maternal body have been reinscribed in these cases. Defining the probationer as a bad mother allows courts to cite and give weight to the attributes considered part of the socially-constructed bad mother. When courts approach these cases from the bad mother perspective,<sup>154</sup> an opportunity is created for courts to fill out the picture of the bad mother. Judges go beyond what was necessary to reach the question before them and open the inquiry into facts considered relevant to assessing the maternal body. Once so classified, the bad mother becomes the target for the imposition of regulatory measures focusing on reproduction. The legal standard which governs the boundaries of probation conditions<sup>155</sup> is unable to stop this dynamic from occurring.

While the *Dominquez/Lent* standard<sup>156</sup> has been a useful tool in combating pregnancy prohibitions, it is less helpful in combating rationales which drive the imposition of reproductive sanctions. First, many of these cases are not appealed,<sup>157</sup> although it is possible

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154. Judge Broadman, who sentenced Darlene Johnson to Norplant said: "[H]ere we're charged here with bad parent." Judgment Proceedings at 5, *People v. Johnson*, No. 29390 (Cal. Super. Ct. Tulare County Jan. 2, 1991) [hereinafter Judgment Proceedings]. See *infra* section II.C.2.b for discussion of *People v. Johnson*.

155. See generally *Parker*, *supra* note 88.

156. See *supra* note 116 and accompanying text.

157. Women who avoid prison terms by agreeing to Norplant are not likely to challenge the validity of the condition. See *Lewin*, *supra* note 7, at A20. ("This kind of thing happens a lot in lower courts and never gets challenged because the defendant's happy not to be in jail.") (quoting Dr. George Annas of Boston University). Perhaps this is part of the reason why judges continue to impose such conditions.

that sentencing judges consider the standard and that, but for the standard, there would be many more cases of court-ordered contraception. It is more probable that from the trial court's perspective, because of the view that the judge is likely to have of the woman affected and because what is at issue for him or her is the woman's "bad mothering," that a reproduction-oriented penalty will seem fitting. On appeal, since the issue is the validity of the trial court's order, the woman is no longer as visible. Thus, the winnowing character of the appellate process may make it easier for appellate courts to see a disjuncture between the crime committed and the penalty imposed.

Second, the standard can be effective only insofar as "unrelated" considerations are evident from the type of condition ordered. Typically, however, the thinking that has preceded the order remains invisible and is untouched, perhaps explaining the persistence of these measures in the face of repeated appellate reversals. Third, the legal standard begs the question of how to decide what is and is not reasonably related to the crime of child abuse, and of what role myths play in resolving questions of law. While probation conditions forbidding procreation have been reversed on appeal, in other words, the legal test repudiates the result, but not the thinking that engendered the result.<sup>158</sup>

### C. *The Norplant Measures*

Eugenically-motivated policies have fallen into disfavor; most laws permitting eugenic considerations in ordering sterilization have been repealed or judicially invalidated.<sup>159</sup> Similarly, when trial courts have ordered probationers not to get pregnant, reviewing courts have uniformly reversed them.<sup>160</sup> Yet the myths that pervade those measures are present in the Norplant measures; what has been rejected, then, has been the means, not the myths that inform them.

To date, five women have been ordered to undergo Norplant implantation as punishment for child abuse, although judges have considered making such an order in at least three additional cases.<sup>161</sup> Norplant has also been the focus of twenty bills in thirteen states, many of which proposed that Norplant implantation be made a probation condition for fertile women convicted of drug-related crimes, or that fertile women receiving public assistance be offered

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158. See *infra* notes 414-17 and accompanying text for further discussion of this point.

159. See REILLY, *supra* note 44, at 160 ("[T]he era of involuntary sterilization for eugenic reasons seems over.").

160. See cases cited *supra* note 88.

161. See *infra* notes 186-217.

financial incentives in the form of cash bonuses for Norplant use.<sup>162</sup> Such orders and bills continued to be made and proposed.<sup>163</sup>

1. *The Norplant Contraceptive Device.* Norplant<sup>164</sup> consists of six<sup>165</sup> match-stick size silastic rods or capsules<sup>166</sup> that are surgically inserted in a woman's upper arm.<sup>167</sup> Implantation takes ten to fifteen minutes and requires a local anesthetic.<sup>168</sup> Once implanted, Norplant is effective for five years, after which time it must be removed.<sup>169</sup> Removal is more difficult and time consuming than insertion, sometimes requiring repeated attempts.<sup>170</sup>

Norplant is ninety-nine percent effective in preventing pregnancy.<sup>171</sup> Its sterilizing effects are allegedly completely reversible;

162. *Norplant: Opportunities and Perils for Low-Income Women*, (Alan Guttmacher Inst., Washington, D.C.), Dec. 1992, at 1, 3 (Special Rep. #1) [hereinafter Alan Guttmacher Institute Special Report].

163. See *infra* notes 216-18 and accompanying text for the most recent Norplant order. See *infra* notes 297-99 and accompanying text for the most recent bills enlisting Norplant.

164. Norplant was developed by The Population Council, a non-profit organization devoted to developing family planning methods, Nicole Wise, *Norplant Met by 'Overwhelming Demand'*, N.Y. TIMES, Feb. 9, 1992, at 3, and is manufactured in Finland. Julia R. Scott, *Norplant and Women of Color*, in NORPLANT AND POOR WOMEN, *supra* note 17, at 40. Wyeth-Ayerst Laboratories, a division of American Home Products Corporation, markets Norplant in the United States. Wise, *supra*.

165. Research is underway to reduce the number of rods to two. Tamar Lewin, *5-Year Contraceptive Implant Seems Headed for Wide Use*, N.Y. TIMES, Nov. 29, 1991, at A1, A26.

166. The capsules are made of silicone rubber. Sheldon J. Segal, *The Development of Norplant Implants*, 14 STUD. FAM. PLAN. 159, 159 (June-July 1983) (special issue devoted to Norplant). Each rod contains 36 milligrams of the synthetic hormone levonorgestrel (a progestin), the same hormone used in some oral contraceptives. WYETH-AYERST LABS., NORPLANT SYSTEM CONSUMER INFORMATION 4 (1991) [hereinafter NORPLANT CONSUMER INFORMATION]. The hormone in the device suppresses ovulation and thickens the mucus lining of the cervix, inhibiting sperm from entering the cervical canal. Segal, *supra*, at 161.

167. NORPLANT CONSUMER INFORMATION, *supra* note 166, at 4.

168. *Id.*

169. *Id.* at 8. Research is currently being conducted to develop a biodegradable implant that will eliminate the need for removal. ROBERT H. BLANK, REGULATING REPRODUCTION 51 (1990); see also Bernadine Healy, *Research Progress on New and Better Methods for Family Planning*, 268 JAMA 1248 (1992).

170. NORPLANT CONSUMER INFORMATION, *supra* note 166, at 8. "Fibrous sheaths form around the Norplant capsules in a very short amount of time, and you have to literally dissect the Norplant away from the tissue, which is difficult, time-consuming, and frustrating." Wise, *supra* note 164, at 3.

171. Thuan Le, *Norplant Birth Control Available in July*, L.A. TIMES, June 18, 1991, at B7. Norplant's failure rate is 0.3% to 0.6% in one year and 1.5% over five years. *Long-Acting Contraceptives*, *supra* note 17, at 1818. Studies indicate, however, that Norplant's effectiveness decreases over the five year period. Irving Sivin, *Norplant Clinical Trials*, in NORPLANT AND POOR WOMEN, *supra* note 17, at 4-5. Norplant is the most effective birth

fertility purportedly returns within twenty-four to forty-eight hours following removal.<sup>172</sup> The total cost of Norplant is approximately \$1000; Norplant itself costs \$365, and insertion and removal cost \$500 and \$200, respectively.<sup>173</sup>

Norplant use may cause side effects: changes in menstrual bleeding,<sup>174</sup> headaches, nervousness, nausea, dizziness, ovarian or fallopian tube enlargement, weight gain, hair loss or excessive hair growth and acne.<sup>175</sup> In addition, Norplant is contraindicated for women with acute liver disease, breast cancer or blood clots<sup>176</sup> and Norplant users with high blood pressure should be closely monitored.<sup>177</sup>

Several of Norplant's attributes likely contribute to its attractiveness to judges and legislators. The temporary nature of Norplant's contraceptive effects shields it from the political liabilities associated with other reproductive sanctions; Norplant is perceived as an acceptable alternative to permanent sterilization.<sup>178</sup> A technological development with the stamp of FDA approval, Norplant may be perceived as a more humane way of achieving the same goals some of the sterilization policies discussed in Section II.A were intended to serve.<sup>179</sup> Against the backdrop of the not-too-distant past, Norplant could be seen as a step forward for women; instead of being criticized for overreaching into the sphere of reproductive choice, the State may be complimented for its restraint.

The warfare mentality of current policy initiatives against

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control method other than male sterilization. Daniel M. Weintraub, *Medi-Cal Offers Norplant Birth Control*, L.A. TIMES, Feb. 22, 1992, at A23.

172. Wise, *supra* note 164, at 3.

173. Reshma Menon, *The Double-edged Sword of Norplant*, CHI. TRIB., Jan. 24, 1993, at 11, available in LEXIS, Nexis Library, CHTRIB File.

174. Wise, *supra* note 164, at 3. According to one study, as many as eighty-two percent of women experienced changes in menstrual bleeding. Steven Findlay, *Birth Control*, U.S. WORLD & NEWS REP., Dec. 24, 1990, at 58, 59.

175. NORPLANT CONSUMER INFORMATION, *supra* note 166, at 14-15.

176. *Id.* at 10.

177. WYETH-AYERST LABS., NORPLANT SYSTEM PRESCRIBING INFORMATION (1990). Pregnant women should not be implanted with Norplant, and implantation is generally not advisable for lactating women. *Id.*

178. Advocates of the Norplant measures hasten to distinguish it from sterilization. For instance, in conditioning Darlene Johnson's probation on implantation with Norplant, Judge Broadman said: "This is not forced sterilization. That went out in the 40's." Judgment Proceedings *supra* note 154, at 8. See *infra* section II.C.2.b for discussion of *People v. Johnson*.

However, if a probationer, age thirty-five, is implanted with Norplant and told she must keep it in place for five years, she may be rendered sterile, if by the end of the probationary term she is no longer able to conceive.

179. A possible advantage of Norplant's availability may be that those disposed to coercing women to undergo sterilization will turn to Norplant instead.



drugs, crime and poverty has fostered the perception that bolder measures for attacking those problems are needed and warranted. Norplant's reputation as a technological breakthrough helps legitimize its use—it is seen as a sophisticated tool for ameliorating complex problems. The apparent ease with which Norplant is invoked by politicians who normally would exercise caution in endorsing potentially unpopular initiatives<sup>180</sup> reflects not only the sense that people are willing to entertain radical ideas, but also, more fundamentally, the idea that the Norplant measures are benign.<sup>181</sup> Public opinion also favors the Norplant measures, thereby furthering their political palatability.<sup>182</sup>

Norplant is ideally suited for the probation and welfare contexts. Since its presence can be easily detected by sight or touch, women can be monitored for compliance with court orders or financial incentive requirements.<sup>183</sup> Norplant enables the State to surveil women in a way that would not be possible with other types of birth

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180. Governor Donald Schaefer of Maryland, for instance, has expressed interest in requiring women on welfare to be implanted with Norplant as a condition of receiving assistance. *Governor's Welfare Plan Pushes Free Birth Control*, N.Y. TIMES, Jan. 17, 1993, at 27.

181. Judge Broadman admonished Johnson's counsel that the decision to implant Johnson "must be kept in perspective"; after all, judges make decisions every day that significantly affect the lives of the individuals before them. Motion to Modify Sentence at 24, *People v. Johnson*, No. 29390 (Cal. Super. Ct. Tulare County Jan. 10, 1991) [hereinafter Motion to Modify]. See *infra* section II.C.2.b for discussion of *People v. Johnson*.

182. Forty-seven percent of respondents to a mail-in poll conducted by *Glamour* magazine thought women receiving public assistance should be offered financial incentives to use Norplant, and fifty-five percent supported mandatory Norplant use for women convicted of child abuse. Coale, *supra* note 9, at 190 n.10 (citing *This is What You Thought*, GLAMOUR, July 1991, at 101). Another poll that questioned 1,679 Californians, found that more than sixty percent felt Norplant should be mandatory for women who abuse drugs. That position was taken by sixty-four percent of the women polled, seven of every ten Latinos questioned and six of every ten African-Americans and whites. Half of all African-Americans and more than half of Latinos 'strongly approve' the concept. George Skelton & Daniel M. Weintraub, *The Times Poll: Most Support Norplant For Teens, Drug Addicts*, L.A. TIMES, May 27, 1991, at A1. In Visalia, California, there was "widespread community support" for Judge Broadman's decision to order Darlene Johnson to be implanted with Norplant. John Hurst, *Controversial Judge Dodges Not Only Critics But Bullet*, L.A. TIMES, Apr. 29, 1991, at A3.

It is interesting to compare the 1991 poll data with similar poll data collected in 1965 by Gallup. That poll asked: "Sometimes unwed mothers on relief continue to have illegitimate children and get relief money for each new child born. What do you think should be done in the case of these women?," Paul, *supra* note 74, at 99-100 (quoting the poll results published in the WASH. POST, Jan. 27, 1965, at 2A). Approximately half of those surveyed thought that the women should be refused any further assistance, and one out of every five suggested sterilization. *Id.* at 100.

183. See NORPLANT CONSUMER INFORMATION, *supra* note 166, at 7.

control.<sup>184</sup> Two additional factors make Norplant an attractive choice in the probation context. First, only a trained practitioner can remove Norplant from a woman's arm. Norplant is thus optimally designed for enforcement purposes. Second, Norplant's effectiveness at preventing pregnancy may prompt judicial and legislative reliance upon it. Norplant offers an appealing alternative to the severity of sterilization and the inefficacy of unenforceable directives forbidding conception.<sup>185</sup>

2. *Norplant and the Judiciary.* Since early 1991, when Norplant began to be distributed in the United States, five women charged with child abuse have accepted Norplant as a condition of probation.<sup>186</sup> Another woman refused Norplant as a probation condition<sup>187</sup> and one judge rejected a defense attorney's suggestion that Norplant be offered as an alternative to jail.<sup>188</sup> The eighth instance of Norplant arose in a child custody hearing in which the judge report-

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184. Arthur, *supra* note 17, at 86-93 (contrasting the enforceability of court orders to use Norplant with court orders to use other types of birth control).

Norplant's utility as an instrument of surveillance has often been noted. See, e.g., Lewin, *supra* note 7, at A20 (quoting Dr. George Annas of Boston University's School of Medicine) ("Norplant presents a special temptation to judges because it's so long lasting and doesn't require any cooperation after it's implanted, and can be monitored by a parole officer just by looking at the woman's arm."); Lewin, *supra* note 165, at A26 ("[T]he presence of Norplant could easily be monitored by a parole officer or welfare official, anxious to prevent further pregnancies in a convicted child-abuser, a woman who carried the AIDS virus or a woman already receiving public assistance."); Arthur, *supra* note 17, at 93.

185. In addition, a judge hesitating to mandate birth control because he or she fears it could encourage abortion (if a probationer, due to birth control failure, were to conceive and thereby violate the court order, she might feel that abortion was her only means of avoiding jail) might be reassured by Norplant's high rate of effectiveness. The court in *People v. Pointer* expressed this concern. 151 Cal. App. 3d 1128, 1140 (Ct. App. 1st Dist. 1984).

186. See *Abusive Mother Accepts Contraceptive Implant*, CHI. TRIB. Feb. 10, 1993, at 3 (Lisa Smith, sentenced in February, 1993); John Makeig, *Surgical Deterrent; Mom Convicted of Child Abuse Picks Birth-Control Implant Over Prison*, HOUS. CHRON., Mar. 6, 1992, at A1 (Ida Jean Tovar, sentenced in April, 1991); *Judge Orders Woman to be Given Contraceptive*, UPI, Sept. 6, 1991, available in LEXIS Nexis Library, UPI File (Cathy Lanel Knighten, sentenced in September, 1991); *People v. Johnson*, No. 29390 (Cal. Super. Ct. Tulare County 1990) (Darlene Johnson, sentenced in January, 1991). Not all of these women ended up getting the implant, however. The court in Carlton's case later changed the Norplant order, requiring instead that Carlton practice birth control, leaving the type of birth control unspecified. See Arthur, *supra* note 17, at 19 n.106, 21. Darlene Johnson accepted the Norplant condition, but subsequently challenged the order, and the condition was stayed pending appeal. See *infra* note 241.

187. See *People v. Garza*, No. 29794 (Cal. Super. Ct. Tulare County 1991), appeal docketed, F016212 (Cal. Ct. App. 5th Dist. 1991).

188. Mack Reed, *Judge Sentences Mother of Slain Baby to Prison*, L.A. TIMES, Oct. 8, 1992, at B5.

edly is considering ordering Norplant.<sup>189</sup>

**a. The Norplant Cases to Date.** Although each of these cases raise slightly different legal questions, they all resemble the involuntary sterilization and court-ordered contraception cases. Similar facts and reasoning recur.<sup>190</sup> A brief review of the Norplant cases will reveal who is subjected to court-ordered Norplant, who requests it, and the range of issues its enlistment raises. Thereafter the case of *People v. Johnson*, which is in many respects representative of the Norplant cases, is explored in detail.

Judge Howard Broadman offered Norplant as an alternative to jail to Norma Duran Garza, who had been convicted by a jury of felony child abuse.<sup>191</sup> After Garza refused Norplant because birth control violated her religious beliefs,<sup>192</sup> the court imposed a state prison sentence of four years, despite the probation department's recommendation that Garza only be sentenced to three hundred and sixty days in local jail followed by a probation term.<sup>193</sup> Garza's case raises the possibility that judges may increase the stakes in such cases in order to get women to make the choices the judges want them to make.<sup>194</sup>

189. *Judge Finds No Legal Precedent for Ordering Contraception*, UPI, Nov. 14, 1992, available in LEXIS, Nexis Library, UPI File.

190. Aside from Johnson's and Garza's cases, this information has been taken from media accounts and a law review article. My information thus is at best second hand and lacks the texts of the judge's own words. It would be interesting to compare the court records, where available, of the Norplant cases, to see how the issues are discussed in the parties' own terms.

191. Appellant's Opening Brief at 9, *People v. Garza*, No. 29794 (Cal. Super. Ct. Tulare County 1991), *appeal docketed*, No. F016212 (Cal. Ct. App. 5th Dist. 1991) [hereinafter Appellant's Opening Brief (Garza)]. At trial, evidence was introduced that Garza had burned her son's hand on the stove, hit him with a belt, extension cord, and high-heeled shoe. *Id.* at 5. "How, when and where these injuries were inflicted, and by whom, was hotly contested." *Id.* Garza was reported to the police by her husband, who filed for exclusive custody of Garza's son. *Id.* at 4. Garza's husband was neither the biological nor adoptive father of Garza's son. *Id.* at n.2.

192. *Id.* at 21-24. After receiving the probation report but prior to sentencing Garza, Judge Broadman asked Garza's attorney if Garza would accept Norplant as a condition of probation.

THE COURT: I need to know the answer to this question because it looms in the horizon, and I just want to get this cat out of the bag once and for all right now, since we're all thinking but no one is saying it. Does this defendant have any interest in the — as a condition of probation, Norplant?

[GARZA'S ATTORNEY]: No.

THE COURT: No?

[GARZA'S ATTORNEY]: No.

THE COURT: Ok.

*Id.* (quoting Reporter's Transcript, June 10, 1991).

193. Respondent's Brief at 1, *People v. Garza*, F016212 (Cal. Ct. App. 5th Dist. 1991).

194. The court's action is being appealed. Garza's attorneys are arguing that the court sentenced her to a long state prison term in reaction to her refusal of Norplant, as

Michelle Carlton was charged with felony child abuse for allowing her infant son to die after her boyfriend had violently shaken him.<sup>195</sup> The boyfriend received a five year sentence,<sup>196</sup> and Carlton was sentenced to a minimum term in county jail and two years probation for failing to prevent her son's death.<sup>197</sup> Further, the judge ordered Carlton "[not] to conceive any children while on probation unless approved by the Court," and commanded her to "[o]btain the Norplant System (or similar implant) birth control."<sup>198</sup>

Twenty-three year-old Cathy Lanel Knighten pled guilty to injuring her daughter;<sup>199</sup> Knighten, the mother of three, was videotaped at Texas Children's Hospital trying to suffocate her daughter.<sup>200</sup> Judge Shaver sentenced Knighten to ten years probation, forbade her to have unsupervised contact with children under the age of fourteen, and required that she be implanted with Norplant.<sup>201</sup> Knighten was implanted, but had an adverse medical reaction to the device.<sup>202</sup> Thereafter she underwent a tubal ligation<sup>203</sup> without conferring with the court as to possible alternatives.<sup>204</sup> Another Texas woman, Ida Jean Tovar, consented to Norplant implantation and ten years of probation.<sup>205</sup> Tovar, who was charged with shaking her two-month old son so severely that he incurred brain damage, agreed to the condition rather than serve a ten-year prison sentence.<sup>206</sup>

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well as that the Norplant condition violates Garza's first amendment right to free exercise of religion. Appellant's Opening Brief (Garza), *supra* note 191, at 21-24. See also *Long-Acting Contraceptives*, *supra* note 17, at 1820 (noting that "[i]n some cases in which incarceration ordinarily would not even be a possibility, the prosecutor could threaten incarceration to ensure that contraception was accepted.").

195. Arthur, *supra* note 17, at 19-20.

196. *Id.* at 20.

197. *Id.*

198. *Id.* (quoting Order of Probation at 2, *State v. Carlton*, No. CR90-1937 (Neb. County Ct. Lincoln County 1991)).

199. *Judge Orders Woman to be Given Contraceptive*, *supra* note 186.

200. *Id.*

201. *Id.* Knighten was also required to attend mental health counseling and parenting classes. *Id.*

202. Rosenblum, *supra* note 17, at 276.

203. A tubal ligation is an operation in which a woman's fallopian tubes are blocked. BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, *THE NEW OUR BODIES, OURSELVES* 257-58 (1984) [hereinafter *THE NEW OUR BODIES, OURSELVES*]. This may be done by burning or cutting the tubes, clipping them shut, or applying rings to them. *Id.* at 258. It is a generally non-reversible sterilization method. Major complications from surgery are uncommon, but possible. *Id.*

204. See Rosenblum, *supra* note 17, at 276.

205. Makeig, *supra* note 186, at A1. It is unclear from the report whether the Norplant condition would extend for the duration of probation. If so, this would require two implantations, as Norplant must be removed after five years of use.

206. *Id.*

When a jury convicted twenty-three year-old Francisca Maria Sanchez of second-degree murder for drowning her newborn son,<sup>207</sup> Sanchez's attorney requested that the judge grant her probation with Norplant as an alternative to jail.<sup>208</sup> The Deputy District Attorney argued that "probation would be too lenient and the Norplant contraceptive inhumane."<sup>209</sup> Judge Lawrence Storch agreed that probation would be an inappropriate punishment for murder, and sentenced Sanchez to fifteen years to life in prison.<sup>210</sup>

The issue of Norplant implantation has also surfaced in a child custody hearing.<sup>211</sup> Thirty six year-old Crystal Gayle Jones is currently responding to an action brought by the Florida Department of Health and Rehabilitative Services to declare her an "unfit mother" and to remove her infant son from her custody.<sup>212</sup> Jones' neighbors signed petitions requesting that the judge have Jones sterilized, in addition to removing her son from her custody.<sup>213</sup> Then child advocacy group Valuing our Children and Law of Jacksonville (VOCAL) then expressed its view that Jones should be implanted with Norplant, and filed a motion to become a party to the case in order to pursue that demand.<sup>214</sup> The judge granted VOCAL's motion to join the case, but stated that he could find no legal precedent for ordering contraception under such circumstances.<sup>215</sup>

Most recently, Lisa Smith was ordered to use Norplant as part of her sentence for aggravated battery.<sup>216</sup> Smith, who was angry with her boyfriend, vented her frustration by hitting her four week-old

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207. Reed, *supra* note 188, at B5. Sanchez had also been charged with attempted-murder for trying to flush another newborn son down the toilet in her home, fourteen months earlier; Sanchez was acquitted of those charges. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* The judge did so while acknowledging that Sanchez did not pose a threat to the community "outside the danger to future unborn children." *Id.*

211. *Judge Finds no Legal Precedent for Ordering Contraception*, *supra* note 189.

212. *Id.* Three of Jones' children had already been removed from her custody in response to charges of emotional and physical abuse. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* A hearing on this issue is scheduled. *Id.*

216. *Abusive Mother Accepts Contraceptive Implant*, *supra* note 186, at 3. In addition to her three and a half year probationary term, Smith must serve a six month jail term and perform community service. *Id.* Smith has a one-year old child who is in permanent custody of the state; the one-month old child is now also in state custody. *Id.* Judge Dozier, who presided over the case, stated: "There is [sic] an awful lot of things she needs to learn and prove she has learned before she should ever have the opportunity to ever parent another child." *Id.* Media reports, however, have not indicated that Smith will receive any counseling or parenting classes. If Norplant is ordered without therapeutic intervention, its truly punitive intention becomes more obvious; it is difficult to see how Norplant alone could aid in the probationer's rehabilitation.

child on the head with a toy music box.<sup>217</sup> While no Norplant order has yet been reviewed by an appellate court, the American Civil Liberties Union will challenge Lisa Smith's Norplant probation condition.<sup>218</sup>

**b. People v. Johnson.** Darlene Johnson was the first woman to be sentenced to probation conditioned on acceptance of Norplant. Johnson, charged with hitting her two eldest daughters with a belt and an electric cord,<sup>219</sup> pled guilty to "three counts of inflicting corporal injury upon a child resulting in a traumatic condition."<sup>220</sup> At the time of her plea, Johnson was twenty-seven years old, had four children, and was pregnant with a fifth child.<sup>221</sup> She was on welfare and had never been married.<sup>222</sup> While her prior record disclosed convictions for theft, forgery and assault and battery,<sup>223</sup> Johnson had no previous convictions for child abuse.<sup>224</sup> Facing a maximum state prison sentence of seven years, Johnson entered her request for probation.<sup>225</sup> Judge Howard R. Broadman of Tulare County Superior Court, Visalia, California, stated that he was "going to try and think . . . of some special probation conditions for this lady . . ."<sup>226</sup>

The judge first remanded Johnson to jail for the month between the plea hearing and sentencing hearing because he feared that Johnson might use drugs and jeopardize her pregnancy if she were released from custody,<sup>227</sup> even though there was no evidence in the record that Johnson used drugs.<sup>228</sup> Judge Broadman told Johnson: "You're going to have this baby under the auspices of the jail and

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217. *ACLU will challenge Norplant Sentence*, UPI, Feb. 11, 1993, available in LEXIS, Nexis Library, UPI File.

218. *Id.*

219. Appellant's Opening Brief at 2, *People v. Johnson*, No. 29390 (Cal. Super. Ct. Tulare County 1990), *appeal docketed*, No. F015316 (Cal. Ct. App. 5th Dist. 1991) [hereinafter Appellant's Opening Brief]. Significantly, at the sentencing hearing, Judge Broadman put his own label on the charge: "[H]ere we're charged with bad parent." Judgment Proceedings, *supra* note 154, at 5.

220. Appellant's Opening Brief, *supra* note 219, at 2.

221. Johnson retained parental rights as to her three daughters, all in foster care, and one son, who lived with his grandparents at the time of the sentencing hearing. Judgment Proceedings, *supra* note 154, at 11.

222. *60 Minutes: Norplant* (CBS television broadcast, Nov. 10, 1991) (page citations refer to transcript on file with the *Buffalo Law Review*) [hereinafter *60 Minutes*].

223. *Id.* at 7. Johnson had served a year and a half in state prison. *Id.*

224. Judgment Proceedings, *supra* note 154, at 2. Judge Broadman stated at the sentencing hearing that he chose not to send Johnson to state prison because her prior offenses were not related to child abuse. *Id.*

225. Appellant's Opening Brief, *supra* note 219, at 10. In Johnson's case it seems that, at most, she would have been sentenced to four years in state prison. Motion to Modify, *supra* note 181, at 3, 4.

226. Appellant's Opening Brief, *supra* note 219, at 7.

227. Judgment Proceedings, *supra* note 154, at 3-4.

228. Appellant's Opening Brief, *supra* note 219, at 8 n.7.

however they do it. Do not send me over a request to be released to have the baby. I'm not going to do that."<sup>229</sup> Johnson was also ordered to inform the judge how much her baby weighed at birth.<sup>230</sup>

At the sentencing hearing, the court granted Johnson's application for probation and suspended her jail sentence for three years, considering those years her probation term.<sup>231</sup> The court then sentenced Johnson to a year in county jail<sup>232</sup> and imposed several probation conditions. Johnson was ordered to attend parenting classes and mental health counseling,<sup>233</sup> forbidden to discipline her children by striking them,<sup>234</sup> and directed to refrain from ingesting alcohol or smoking cigarettes for the duration of her pregnancy.<sup>235</sup> Judge Broadman explained: "I also ordered her not to smoke cigarettes as a condition of being on probation. I told her that since she was pregnant, if she got caught smoking, I was going to send her to prison and take away the baby."<sup>236</sup>

Judge Broadman then directed that Johnson be implanted with Norplant.<sup>237</sup>

THE COURT: Are you on welfare?

JOHNSON: I was.

THE COURT: Okay. And you will be again, right?

JOHNSON: Yeah.

THE COURT: Do you want to get pregnant again?

JOHNSON: No.

THE COURT: Okay. As a condition of your probation, you know, this new thing that's going to be available next month, you probably haven't heard about it. It's called Norplant.

JOHNSON: No.

THE COURT: It's a thing you put into your arm and it lasts for five years. You can't get—it's like birth control pills except you don't have to take them everyday. If I order that as a condition of your probation, then maybe MediCal or Medicare will pay for that.

JOHNSON: Is it harmful to the body?

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229. *Id.* at 8.

230. Judgment Proceedings, *supra* note 154, at 13.

231. *Id.* at 6.

232. *Id.* at 8; Appellant's Opening Brief, *supra* note 219, at 2.

233. Judgment Proceedings, *supra* note 154, at 9.

234. *Id.*

235. *Id.* Judge Broadman had indicated at the plea hearing that he would be imposing these conditions of probation, but did not mention an intention to order birth control. *Id.* at 8.

236. *Id.* at 8 n.6.

237. *Id.* at 7; Respondent's Supplemental Brief, at 1, *People v. Johnson*, No. 29390 (Cal. Super. Ct. Tulare County 1990), *appeal docketed*, No. F015316 (Cal. Ct. App. 5th Dist. 1991) [hereinafter Respondent's Supplemental Brief]. Norplant was not yet on the market. Appellant's Opening Brief, *supra* note 219, at 9; Judgment Proceedings, *supra* note 154, at 6.

THE COURT: Well, it's like a birth control pill. It's F.D.A. approved. It's not experimental. What do you think about that?

JOHNSON: Okay.<sup>238</sup>

Following this exchange, Johnson consented to Norplant implantation. She "okayed" the probation condition before the court indicated that Norplant's sterilization effects were temporary.<sup>239</sup>

Johnson changed her mind about the Norplant condition five days later and filed a motion to reconsider.<sup>240</sup> The court denied her motion,<sup>241</sup> finding that her consent to Norplant was "willing, knowing [and] voluntary"<sup>242</sup> and that "the rights of [her] unconceived children were paramount"<sup>243</sup> and "superseded [her] constitutional right" to procreate.<sup>244</sup> In justifying his refusal to modify the order, Judge Broadman stressed the physical injury inflicted on Johnson's children<sup>245</sup> and his view that prohibiting Johnson from conceiving additional children was essential to her rehabilitation, as it would reduce her stress level.<sup>246</sup>

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238. Judgment Proceedings, *supra* note 154, at 13.

239. *Id.* In fact it was Johnson's attorney who thought to make sure that Norplant's sterilization effects were reversible. Motion to Modify, *supra* note 181, at 14.

240. Appellant's Opening Brief, *supra* note 204, at 11.

241. *Id.* at 24. Johnson appealed the order denying her motion to modify, and the court granted Johnson's application for a stay of the Norplant condition pending the outcome of her appeal of the condition. Appellant's Opening Brief, *supra* note 219, at 3 n.2. The appeal was later dismissed, however, because Johnson violated the terms of her probation prohibiting drug use (ten months after sentencing, Johnson had agreed to a drug test and tested positive for cocaine), and her terms and conditions of probation were modified to include a drug component. Dave Cooper, *Woman in Norplant Case Ordered Back for Sentencing*, Gannett News Service, Dec. 20, 1991, available in LEXIS, Nexis Library, GNS File. Johnson later violated the drug probation condition and was sentenced to five years in prison, rendering moot the Norplant condition. *Birth Curb Order is Declared Moot*, N.Y. TIMES, Apr. 15, 1992, at A23.

242. Motion to Modify, *supra* note 181, at 17. It should be noted that the State of California subsequently conceded that Johnson's consent had not been informed. Respondent's Supplemental Brief, *supra* note 223, at 2.

243. Appellant's Opening Brief, *supra* note 219, at 12.

244. *Id.* While the court acknowledged that the right to procreate is "substantial" and "constitutionally protected," it also noted that such right is "not absolute" and "in a proper case it can be limited." Motion to Modify, *supra* note 181, at 20. Judge Broadman, justifying his decision to require Darlene Johnson to undergo implantation with Norplant later stated: "[W]hat you have to do as a judge is, you must balance conflicting constitutional rights. And here, what I did was, I found that there were constitutional rights of the children, [Darlene Johnson's] born children and her unconceived children, and I balanced their rights against her rights, and they won." 60 Minutes, *supra* note 222, at 8.

245. See, e.g., Motion to Modify, *supra* note 181, at 18.

246. Judge Broadman stated: "[Johnson] has four children and is currently pregnant. The stress and trauma of a sixth child on a person who is a convicted child abuser with her record cannot but help delay or prevent her ultimate rehabilitation." Motion to Modify, *supra* note 181, at 21. Judge Broadman also believed that "[t]he birth of



**c. Mapping the Myth.** Johnson's profile resembles that of many of the women previously described: a single mother, of color, on welfare, and having several children who receive public assistance.<sup>247</sup> Thus the basic pool of facts Judge Broadman had to draw upon is a familiar one. The dynamic of the case, how it unfolded from the initial problem—Johnson was found guilty of child abuse—to its final disposition—Johnson was offered the choice between Norplant implantation and a prison term, should also be familiar. Finally, *Johnson* raises familiar questions: Why did Judge Broadman ask Johnson about welfare before he asked about her pregnancies? Why did he speculate that Johnson might harm her fetus by using drugs when there had been no evidence of drug use?<sup>248</sup> In sentencing Johnson to Norplant, did Judge Broadman believe<sup>249</sup> he was attacking the problem of child abuse at its roots?

*Johnson* illustrates the frequent fusion of reproductive capacity and criminal conduct. The ease with which the two are conflated illuminates the process by which the myths surrounding women's maternal roles are generated. There seems to be a link between the court's perception that Johnson is a "bad mother" and the type of control it imposes. The Norplant sanction is designed to regulate Johnson's ability to reproduce and to punish her for being a "bad mother," rather than for her criminal conduct. While the severity of Johnson's crime probably also influenced Judge Broadman's decision,<sup>250</sup> if this were his only or even predominant concern, the proba-

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additional children until after she has successfully completed the court-ordered mental health counseling and parenting classes dooms her and any subsequent children to repeat this vicious cycle." *Id.* at 20.

247. Precisely how many of the women whose sentences have been affected by Norplant are women of color is difficult to determine, as news accounts and trial testimony often do not indicate the probationer's race. It is likely, however, that the majority of women to be prosecuted for child abuse, or for exposing their fetuses to drugs, will be women of color. See *infra* note 392.

248. For a similar case see *United States v. Vaughn*, Crim. No. F2172-88B (D.C. Super. Ct. Aug. 23, 1988) (cited by Roberts, *supra* note 32, at 1431 n.54). Vaughn, a pregnant woman who pled guilty to forgery, was imprisoned during her pregnancy because she tested positive for cocaine. Roberts, *supra* note 35, at 1431, 1431 n.55 (citing Kary Moss, *Pregnant? Go Directly to Jail*, A.B.A. J., Nov. 1, 1988, at 20).

249. I do not intend to hypothesize about Judge Broadman's psyche. It would, however, be interesting to know what Judge Broadman thought: Did he think he was getting at the root of the problem of child abuse by preventing Johnson from conceiving?

250. I do not wish to suggest that there is never any true relation between the characteristics courts discuss and the probationer's bad conduct, or that judges should view behavior in a vacuum. Rather I think it is important to ask why some of their analysis looks the way it does—why are these the additional attributes they choose to bolster their decision? I suggest that because the judge seeks to persuade, he or she will draw upon facts calculated to persuade—in large part because those facts were the ones he or she found persuasive. Precisely because we share many of the same ideas and subscribe to the same myths, we often fail to question the inclusion of these facts or the leaps made

tion conditions imposed might have been quite different. He could have terminated Johnson's parental rights and/or ordered her not to have any unsupervised contact with her children. Instead, Judge Broadman imprisoned Johnson to prevent her from using drugs, prohibited her from engaging in prenatal conduct unhealthy to the fetus, and directed her not to conceive. This suggests a different judicial agenda.

The Norplant probation condition bespeaks an agenda of control.<sup>251</sup> As this Comment has suggested, the restrictive measures that frequently accompany probation conditions barring procreation may be seen as attempts to offset a woman's perceived lack of self-control, particularly in situations where there is no father or husband to provide that control.<sup>252</sup> The prosecutor in Knighten's case, for example, remarked that the Norplant condition could be amended if Knighten had a "stable relationship with a man or a loving environment for her children."<sup>253</sup> A man would presumably assume the court's responsibility to control Knighten, at which point the Norplant condition could be lifted. Similarly, Tracy Wilder's attorney felt that if Wilder had "developed a stable relationship, married, and wanted to have children, [the judge] would amend the probation requirement."<sup>254</sup>

Judges also try to counteract the presumed inability of women to control themselves—derived in part from "evidence" of their "irresponsible thinking"<sup>255</sup>—when it appears that lack of self-re-

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from them. See also *infra* notes 412-13 and accompanying text.

251. At times the judges' words seem to reflect their vision of themselves as personally responsible for exerting all these levels of control. When referring later to his decision that Johnson be implanted with Norplant, Judge Broadman said, "[I] indicated by a hand movement that I was going to be implanting [the Norplant device] in her upper forearm." Motion to Modify, *supra* note 181, at 7 (emphasis added.) Judge Peter Wolf, who sentenced Brenda Vaughn (see *supra* note 248), said: "I'm going to keep her locked up until the baby is born because she's tested positive for cocaine when she came before me . . . . She's apparently an addictive personality, and I'll be darned if I'm going to have a baby born that way." Roberts, *supra* note 35, at 1431 (citing Kary Moss, *Pregnant? Go Directly to Jail*, A.B.A. J., Nov. 1, 1988, at 20) (emphasis added). Similarly, Judge Broadman said in *Zaring*, "I'm afraid that if you get pregnant *we're* going to get a cocaine or heroin addicted baby." *People v. Zaring*, 8 Cal. App. 4th at 368 (emphasis added). The message *Zaring's* procreative punishment conveyed was, "*we're* not going to let that happen."

252. I use the terms "father" and "husbands" because they have traditionally been the family disciplinarians. I recognize that both male and female judges have assumed this role.

253. Telephone Interview with Donna Goode, Prosecutor, Harris County District Attorney's Office, Houston, TX. (Feb. 17, 1992).

254. Barringer, *supra* note 88, at 33.

255. *State v. Norman*, 484 So.2d 952, 953 (La. App. 1 Cir. 1986).

straint might endanger a fetus.<sup>256</sup> This is why Johnson was jailed during her pregnancy. When Judge Broadman told Johnson, who was pregnant at the time of her plea hearing, that he would want to be told how much the baby weighed,<sup>257</sup> he may have been looking for a way to assess whether Johnson had been engaging in any prenatal conduct detrimental to the fetus. Melody Baldwin<sup>258</sup> was also monitored during her pregnancy. She was hospitalized because her inability to keep food down jeopardized the health of her fetus.<sup>259</sup> When hospital officials told Judge Jones that Baldwin no longer required hospitalization, he had her transferred to the psychiatric ward of a county hospital that performed sterilization procedures.<sup>260</sup>

In the absence of the "fetal protection" rationale, these highly restrictive measures are justified as being in the affected woman's best interests.<sup>261</sup> The "best interests" rationale is bolstered by the implication that the women chose to be regulated. When Judge

256. Although it is beyond the scope of this Comment, the Norplant measures are part of a larger trend of dealing harshly and restrictively with transgressing mothers, particularly in the area of prenatal conduct. See Symposium, *Substance Use During Pregnancy: Legal and Social Responses*, 43 HASTINGS L.J. 505 (1992); James Denison, Note, *The Efficacy and Constitutionality of Criminal Punishment for Maternal Substance Abuse*, 64 S. CAL. L. REV. 1104 (1991); Shona B. Glink, Note, *The Prosecution of Maternal Fetal Abuse: Is this the Answer?* 1991 U. ILL. REV. 533 (1991); Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse"*, 101 HARV. L. REV. 994 (1988); Margaret Phillips, Note, *The Umbilical Cord: The New Drug Connection*, 40 BUFF. L. REV. 525 (1992); *Special Project: Legal Rights and Issues Surrounding Conception, Pregnancy and Birth*, 39 VAND. L. REV. 597 (1986).

For a general discussion of a similar phenomenon, see Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986). Citing the reforms which occupied the Progressives, Minow points out that "humanitarian concerns and paternalistic measures . . . became more politically palatable when focused on children." *Id.* at 9. Minow elaborates:

[C]hildren simply are not the real focus of the varied laws that affect them. Instead, other powerful social goals are the focus of these laws. Traffic safety, control of violent crime, and regulation of abortion, for example, are social goals in which children may have incidental roles, and the laws affecting children in these areas actually play out political and practical debates which make children quite beside the point.

*Id.* at 5-6.

257. Judgment Proceedings, *supra* note 154, at 13.

258. See *supra* notes 102-03 and accompanying text.

259. *Judge Still Asking Woman to be Sterilized*, UPI, August 4, 1988, available in LEXIS, Nexis Library, UPI File. A lawyer, Timothy L. Bookwalter, was appointed by Judge Jones to represent the interests of Baldwin's fetus. *Id.* He advocated Baldwin's sterilization and said: "We can't protect [Baldwin] each time she gets pregnant. She might kill this kid too." *Id.*

260. *Id.*; Joseph R. Tybor, *Does Sterilization Fit the Crime? Woman Must Decide*, CHI. TRIB., Sept. 25, 1984, at 4.

261. Barbara Feringa et al., *Norplant: Potential for Coercion, in NORPLANT AND POOR WOMEN*, *supra* note 17, at 60 (observing that "[p]roponents of [the Norplant measures] argue that . . . such 'tough love' tactics are also beneficial to the targeted women.").

Broadman sentenced Darlene Johnson, he said: "When Miss Johnson agreed to the birth control, she finally acknowledged that it was the child's turn."<sup>262</sup> That is, *he* found that the interests of the children outweighed those of the mother, but then suggested that Johnson herself decided that the children's interests outweighed her own. Similarly, Melody Baldwin's attorney said, "I think she will go through with it. . . . She doesn't want to have any more children because she is well aware of the real possibility that this kind of thing could happen again. Though this is a real hard decision to make, both she and I are pleased that she has some choice over her sentencing and the control of her destiny."<sup>263</sup> The public defender in Debra Ann William's case said of William's decision to be sterilized: "She's accepted responsibility for what has happened. She's addressed the problem the only way she can—by getting sterilized."<sup>264</sup>

By painting reproductive sanctions as the woman's choice, criminal justice officials abdicate responsibility for *their* choices, and, in characterizing the sanction as a means through which women will gain some control over their lives, divert attention from

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262. Motion to Modify, *supra* note 181, at 22.

263. Tybor, *supra* note 260, at 4. Similar arguments about defendants "choosing" their punishment have been advanced in the context of castration for male sex offenders. In a 1985 South Carolina case, the defendant was convicted of rape and offered a commuted sentence if he would agree to castration. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 33 (1991). The Supreme Court of South Carolina ruled that castration amounted to cruel and unusual punishment, and that it made no difference that the defendant "chose" the punishment. *Id.*

A debate raged in Texas last year over whether a man convicted of child sexual assault would be castrated as a condition of his probation. *NAACP Wants to Stop Defendant's Proposed Castration*, UPI, Feb. 11, 1992, available in LEXIS, Nexis Library, UPI File. The defendant, Steven Butler, age twenty-seven, asked to be castrated and sentenced to probation, rather than face a possible term of life imprisonment. *Accused Child Abuser Opts for Castration as Alternative to Prison*, UPI, Feb. 6, 1992, available in LEXIS, Nexis Library, UPI File. Judge McSpadden ruled to allow the castration condition. Robert Suro, *Amid Controversy, Castration Plan in Texas Rape Case Collapses*, N.Y. TIMES, Mar. 17, 1992, at A16. Then because no doctor would agree to perform the surgery, Judge McFadden withdrew his approval of the condition. *Judge Cancels Approval of Rape Suspect's Castration*, L.A. TIMES, Mar. 17, 1992, at A13.

It is interesting that the public generally strongly disapproved of the castration order. Not so with Norplant. See *supra* note 182, for public opinion poll data on Norplant. Philip Reilly notes that there was a discrepancy between public opinion regarding sterilization and castration during the early twentieth century, when most of the eugenic sterilizations were performed. REILLY, *supra* note 44, at 29 ("Castration was too brutal to provide a socially acceptable solution to curbing the fecundity of the feeble-minded. In the early 1900s, however, it provided a foil against which sterilization seemed humane and politically more palatable.").

264. Feeley, *supra* note 88, at 61. It is more likely that the prosecutor believes sterilization to be Williams' only solution than that Williams believes this is so. Note too that it is again emphasized that the woman who is the subject of reproductive control—here Williams—has taken responsibility: sterilization was *her* decision.

their truly disempowering nature. The judge who offered Baldwin the option of sterilization for a reduced prison term said: "Here is a woman who should not be a mother, someone who has killed her child and pleaded guilty to neglect. I think she needs to recognize that the same thing can happen again and take steps to control that it doesn't."<sup>265</sup> This is significant for two reasons. First, the imposition of reproductive control suggests that the judge saw these two issues—abuse and reproduction—as one issue. Second, this regulatory intervention actually usurps a woman's control in the name of offering her control. Note that the judge did not encourage Baldwin to take steps to control her child abuse; *he* took steps to control her reproduction.

Some criminal justice officials admit that they like Norplant because of the measure of control it affords them. The judge in Ida Jean Tovar's case stated: "It was my idea. I felt like [the crime] was worth 10 years in the penitentiary, but I'm also very aware of the early release problem."<sup>266</sup> He feared that a ten year sentence might have meant two years of actual jail time, and "an early release 'without much supervision.'"<sup>267</sup> Similarly, Cathy Knighten's prosecutor stressed that probation with Norplant rather than a jail term allowed the State to maintain jurisdiction over Knighten; via the Norplant condition the State would "have some control over these people."<sup>268</sup> The prosecutor described Knighten as already having "too much responsibility," which was detrimental to her own life and to the lives of her children.<sup>269</sup>

When a woman has any of the "component characteristics" of the "bad mother"—if she is a single mother, or has illegitimate children, or receives welfare—she is likely to be seen as a bad mother in the eyes of the judge. These characteristics are cues that appear to persuade courts that broad, far-reaching intervention is needed. What of the truth that these "component characteristics" *are* often found together—that Johnson was on welfare, as Judge Broadman

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265. Tybor, *supra* note 260, at 4 (quoting Marion County Superior Court Judge Roy Jones).

266. *Id.*

267. *Id.*

268. Telephone Interview with Donna Goode, *supra* note 253. Recall that Judge Jensen in Melinda Middleton's case also used the phrase "these people." See *supra* text preceding note 110.

269. Telephone interview with Donna Goode, *supra* note 253. Conversely, the prosecutor in Francisca Maria Sanchez's case argued that the Norplant condition was not sufficiently monitorable and that jail was preferable. The prosecutor argued that the Norplant condition would be difficult to monitor: "We can't be sure if we put an implant in her that she'd take (the) bus to Tijuana and that thing would be out in a week." *Id.* Under her jail sentence, Sanchez would be eligible for parole in ten years, assuming time off for good behavior. *Id.*

suspected, and that she did ultimately use drugs, as Judge Broadman anticipated?<sup>270</sup> Race and poverty,<sup>271</sup> and poverty and single motherhood,<sup>272</sup> do frequently coincide. As noted earlier, myths are comprised of fact and fiction. The dual nature of myths is precisely what makes them so beguiling and elusive, and allows them to be perpetuated unthinkingly as often as intentionally.

### 3. *Norplant and the Legislature.*

**a. Proposed Legislation Authorizing Court-Ordered Norplant.** Several state legislatures have considered bills, none of which has been approved, authorizing courts to impose Norplant as punishment for drug related offenses. Kansas Representative Kerry Patrick introduced a bill to authorize Norplant as a probation condition. The measure, which died in committee, required fertile women convicted of violating the Uniform Controlled Substances Act<sup>273</sup> to be implanted with Norplant or a "functionally equivalent contraceptive" to remain in place for twelve months.<sup>274</sup> Similarly, during debate in the Colorado House of a "catch-all crime bill," an amendment to permit judges to order women convicted of drug offenses to be implanted with Norplant was proposed and rejected.<sup>275</sup>

Bills providing for Norplant implantation of drug-addicted women who give birth to drug-addicted children were introduced in Ohio, South Carolina and Washington.<sup>276</sup> The Ohio bill proposed

270. See *supra* note 241.

271. In the United States, fifty-six percent of all black women and fifty-one percent of all Hispanic women aged fifteen to forty-four have family incomes below 200 percent of poverty. Jacqueline D. Forrest, *Norplant and Poor Women*, in *NORPLANT AND POOR WOMEN*, *supra* note 17, at 22.

272. "[F]ifty-two percent of formerly married women and forty-four percent of never married women (who are not currently in a cohabitating relationship) fall below 200 percent of poverty . . ." *Id.*

273. The Uniform Controlled Substances Act illegalizes the possession and sale of controlled substances. KAN. STAT. ANN. § 65-4127a (1985).

274. Kan. H.B. 2255, 74th Leg., 2d Sess. (1991). The proposed measure would have required courts to order the defendant,

if the defendant is a woman who is able to become pregnant and such defendant has been convicted of K.S.A. 65-4127a, and amendments thereto, to be implanted with the Norplant contraceptive implant, or another functionally equivalent contraceptive which provides similar long-lasting pregnancy prevention, which has been approved by the secretary of social and rehabilitation services. The implant shall be removed from the defendant after 12 months of random drug testing in which such tests were returned negative. Such defendant shall not be subject to this section if a person licensed to practice medicine and surgery issues a statement that the defendant is medically unable to be implanted with such contraceptive.

*Id.*

275. See Alan Guttmacher Institute Special Report, *supra* note 162, at 4.

276. *Id.* at 3-4. Governor Pete Wilson of California has also considered a plan which

Norplant implantation as punishment for substance abuse during pregnancy.<sup>277</sup> Following a first offense a woman could choose either to enroll in a drug treatment program or to be implanted with Norplant.<sup>278</sup> After a second offense, Norplant implantation became mandatory.<sup>279</sup> The Washington measure would have granted courts the authority to mandate Norplant implantation of any woman who gave birth to a child suffering from fetal alcohol syndrome or drug addiction.<sup>280</sup> The bill would also have permitted women to be involuntarily institutionalized for a diagnostic examination.<sup>281</sup> The South Carolina legislature considered a bill that required physicians to test newborns for drugs if they had reason to suspect the mother used drugs during pregnancy.<sup>282</sup> A positive drug test would have been considered prima facie evidence that the newborn was abused, and the Department of Social Services would have been able to petition the family court for relief.<sup>283</sup> If the family court found that the positive drug tests were accurate, it could order either Norplant or sterilization.<sup>284</sup>

The apparent motivation for these measures is the protection of unborn children from the adverse health consequences of drug use by their mothers. Legislators thus share the concern of Judge Broadman and others that pregnant addicts be prevented from inflicting drug-related injuries on their children. Yet, it is odd that none of these measures authorize Norplant as a probation condition for child abuse—especially since court orders of Norplant have all been in response to child abuse. By focusing on prenatal conduct, legislators may be attempting to accomplish through the legislature that which has not been accomplished through the judiciary. By punishing a woman for drug use while pregnant or for giving birth to a child damaged by drugs, legislatures can punish prenatal behavior that cannot usually be treated as a crime. It may also be that when forced to articulate the perceived connection between child abuse and the procreative sanction of Norplant, the connection was too tenuous (or sounded too politically risky) to make explicit. Moreover, a bill punishing fertile female drug abusers but not male

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would mandate Norplant for "drug-abusing women of childbearing age." Weintraub, *supra* note 171, at A23.

277. Alan Guttmacher Institute Special Report, *supra* note 162, at 4; see also Mertus & Heller, *supra* note 17, at 363.

278. Mertus & Heller, *supra* note 17, at 363.

279. *Id.*

280. Alan Guttmacher Institute Special Report, *supra* note 162, at 4.

281. *Legislation and Litigation Involving Norplant*, (Women's Legal Def. Fund, Washington, D.C.), June 1992, at 1, 4.

282. Mertus & Heller, *supra* note 17, at 363.

283. *Id.*

284. *Id.*

drug abusers is probably easier to justify when the "umbilical connection"<sup>285</sup> is the focus of attention. By contrast, it is more difficult to put into statutory words an argument that the female child abuser stands in a different relationship to the abused child than a male child abuser.<sup>286</sup>

**b. Proposed Welfare Measures.** Several state legislatures have also considered measures to offer cash bonuses to fertile women on public assistance who consent to implantation with Norplant. Representative Patrick of Kansas introduced a bill authorizing payment of five hundred dollars to women receiving Aid to Families with Dependent Children (AFDC) if they would agree to Norplant implantation.<sup>287</sup> The measure also provided that each woman would receive an additional fifty dollars per year for every year she kept the device in place.<sup>288</sup>

Similar bills were also introduced and ultimately rejected in

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285. The theory under which some women have been prosecuted for prenatal child abuse is that they "delivered" drugs to their fetuses via their umbilical cords. *See generally* Phillips, *supra* note 256, at 525-26.

286. Courts also seem to view female and male child abusers differently, as is evident from their reluctance to impose procreative punishments (by which I mean punishments that implicate parts of the body involved in reproduction) on male child abusers. Yet courts have turned to procreative penalties for male sex offenders, including child molesters. *See, e.g.,* Briley v. California, 564 F.2d 849 (9th Cir. 1977) (man pled guilty to lesser charge of child molestation conditioned on consent to castration); *People v. Blankenship*, 61 P.2d 352 (Cal. Dist. Ct. App. 1936) (man pled guilty to statutory rape and was sentenced to probation conditioned on sterilization). In *People v. Gauntlett* 352 N.W.2d 310 (Mich. Ct. App. 1984), a man convicted of sexually abusing his step-daughter was sentenced to "chemical castration" with depo-provera, a long-acting contraceptive drug which has been used against male sex offenders to reduce their sex-drive. William Green, *Miscarriage of Justice*, TRIAL, July 1991, at 61. The reviewing court in *Gauntlett* disallowed the condition because it considered the drug experimental, and was concerned about side effects. 352 N.W.2d at 316. Depo-provera was approved by the FDA for use as a contraceptive for women in November of 1992. Felicity Barringer, *Making Birth Control Easier Raises Touchy Political Issues*, N.Y. TIMES, Nov. 8, 1992, at 6.

287. Kan. H.B. 2089, 74th Leg., 2d Sess. (1991).

288. *Id.* The bill read:

[T]he secretary of social and rehabilitation services shall establish a program to make available the Norplant contraceptive implant, or another functionally equivalent contraceptive which provides similar long-lasting pregnancy prevention, which has been approved by the secretary for this program, to each public assistance recipient who is able to become pregnant and who is receiving aid to families with dependent children. Each such public assistance recipient who has the Norplant contraceptive . . . implanted under this program shall be eligible to receive under this program a special financial assistance grant in the amount of \$500 and a special annual financial assistance grant in the amount of \$50 during the period that the contraceptive remains implanted and continues to be effective in preventing pregnancy. The program shall provide for examinations by health care providers to provide for the health and safety of public assistance recipients who are to have the contraceptive implanted under the program.

*Id.*



Louisiana, Texas and Tennessee.<sup>289</sup> When it was originally introduced, the Tennessee bill closely resembled the Kansas bill; it was subsequently amended two times.<sup>290</sup> The first amendment modified the bill to offer men receiving Medicaid five hundred dollars to undergo a vasectomy.<sup>291</sup> The second amendment substituted a five hundred dollar scholarship for the five hundred dollar cash bonus.<sup>292</sup> The amended bill passed in the House but died without approval at the end of the session.<sup>293</sup>

The Mississippi Senate considered a bill that would have mandated Norplant, rather than "encouraged" its use via financial incentives.<sup>294</sup> It required women with four or more children to be implanted with Norplant in order to qualify for or continue to be eligible for public assistance.<sup>295</sup> Maryland's Governor recently indicated that he would consider mandating Norplant as a precondition to welfare receipt.<sup>296</sup>

The 1993 legislative session will usher in similar measures. A bill introduced this year in the Florida senate would offer an increase in AFDC payments to women implanted with Norplant.<sup>297</sup> Tennessee<sup>298</sup> and Washington<sup>299</sup> will again consider Norplant legislation.

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289. Alan Guttmacher Institute Special Report, *supra* note 162, at 3-4.

290. *Id.* at 3. The program envisioned by the bill was described as a "pilot project" and was limited to the first five percent of participants. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at 4.

295. *Id.*

296. *Governor's Welfare Plan Pushes Free Birth Control*, *supra* note 180, at 27.

297. Fla. S. 1886, 13th Leg., 1st Reg. Sess. (1993), available in LEXIS, Legis Library, STTRCK File. The measure "provides that each recipient of Aid to Families with Dependent Children is to receive \$258 per month, or, if she has a Norplant implant, \$400 per month." *Id.* This measure was sponsored by Senator Rick Dantzler. *Id.* At one time Dantzler was considering making Norplant a prerequisite for public assistance. Jim Ash, Gannett News Service, Jan. 22, 1993, available in LEXIS, Nexis Library, GNS File.

298. Tenn. H.B. 1214, 98th Gen. Assem., 1st Reg. Sess. (1993), available in LEXIS, Legis Library, STTRCK File; Tenn. S. 407, 98th Gen. Assem., 1st Reg. Sess. (1993), available in LEXIS, Legis Library, STTRCK File.

299. Wash. S. 5249, 53rd Leg., Reg. Sess. § 2(1) (1993). This bill provides that: If a designated chemical dependency specialist receives information alleging that a woman has given birth to a baby with fetal alcohol syndrome or addicted to drugs, the designated chemical dependency specialist . . . may file a petition with the superior or district court for the involuntary insertion of birth control known as Norplant into the woman.

*Id.* The proposed bill also states that "[i]f after hearing all relevant evidence . . . the court finds that the mother has given birth to a baby with fetal alcohol syndrome or addicted to drugs by clear, cogent, and convincing proof, it shall make an order to involuntary insertion of Norplant into the mother." *Id.* § 2(4). A woman implanted pursuant to this bill would not be permitted to have Norplant removed "until six months after the court finds she is clean and sober." *Id.* § 2(5).

Like sterilization incentives, Norplant incentives may take different forms.<sup>300</sup> In 1993, for example, the Virginia legislature approved a plan to provide state health clinics with up to six hundred thousand dollars to implant Norplant in women who request it.<sup>301</sup> While the program is meant to offer women the choice to use Norplant, if, in order to qualify for funds, clinics have to demonstrate that women are choosing Norplant, they may have an incentive to persuade women to make that "choice."<sup>302</sup>

Recent efforts at welfare reform have focused on the welfare mother.<sup>303</sup> Several states have modified programs providing benefits to women with children as a way to reduce welfare costs.<sup>304</sup> A New Jersey law that went into effect in the fall of 1992 reduces state and federal welfare grants to single-mother families by denying them the minimum increase per child formerly provided under the AFDC program.<sup>305</sup> A Wisconsin plan set to go into effect in July of 1993 will "curb" increased benefits to women who have additional children while on welfare.<sup>306</sup> California,<sup>307</sup> Maryland<sup>308</sup> and Arkansas<sup>309</sup> have considered similar action. According to one source, a bill introduced in the Washington House would have denied welfare benefits to children born after the application for assistance was made<sup>310</sup> and a

300. See *supra* note 80 (discussing sterilization incentives).

301. Peter Baker, *VA. Assembly Approves Norplant Money Despite Critics*, WASH. POST, Feb. 12, 1993, at D1.

302. Some argue that "incentives are voluntary, since people can either choose to accept them or refuse them if they want," but "[s]uch views display a fundamental ignorance of the social context in which incentives are introduced." HARTMANN, *supra* note 80, at 65.

303. See, e.g., Robert B. Gunnison, *Clinton Tells Governors Experiment With Welfare; President Says Federal Rules Will be Relaxed*, S.F. CHRON., Feb. 3, 1993, at A1, available in LEXIS, Nexis Library, SFCHRN File (noting that states will have increased flexibility for reforming their welfare systems). See also, Williams, *supra* note 82, at 720 nn.4-8.

304. Martha F. Davis, *War on Poverty, War on Women*, N.Y. TIMES, Aug. 3, 1991, at 19.

305. Gunnison, *supra* note 303.

306. *Id.*

307. *Id.* See also *Legislative Proposals and Actions*, 3 STATE REPROD. HEALTH MONITOR (Alan Guttmacher Inst., Washington, D.C.), Dec. 1992, at i, ix. Referring to the proposed legislation to deny additional benefits for children born after the application for assistance is made, Governor Wilson of California said it would "end the insidious incentive we are giving single mothers, especially teen-age girls, to continue having children out of wedlock." Virginia Ellis, *Wilson Testing Appeal of Tying Benefits to Behavior; Prop. 165: Measure Would Bar Additional Funds for Mothers Who Have More Children While Receiving Aid*, L.A. TIMES, Oct. 8, 1992, at A1, A28 (quoting Governor Wilson).

308. John Frece, *Maryland: Additional Welfare Benefits May Be Denied*, BALT. SUN, Feb. 24, 1992 available in LEXIS, Nexis Library, ABRPT File (discussing proposed legislation); *Legislative Proposals and Action*, *supra* note 307, at ix (noting that the Maryland legislature failed to approve the bill).

309. *Legislative Proposals and Action*, *supra* note 307, at ix.

310. *Compassion Fatigue—Separating Tired Welfare Myths From the Facts*, SEATTLE

Senate bill would have offered women on welfare ten thousand dollars to undergo sterilization.<sup>311</sup>

**c. Mapping the Myth.** Much of the discussion of the Norplant legislative measures, particularly those directed at the probation and welfare contexts, resembles dialogues encountered earlier. Kerry Patrick, who proposed the Kansas bills, declared:

The real question is, do we, as a society, since we're paying welfare to these people, taking care of people who can't take care of themselves—is our obligation in the reproductive area unlimited? And just like anything, there's got to be some sort of limits. Why do we have an obligation as a taxpayer for her to have two, three, four or five children, when we can provide an incentive that would limit it? I mean, the taxpayers have rights.<sup>312</sup>

Representative Patrick identifies the problem as one of "people"—welfare mothers—who cannot take care of themselves; the proof of the welfare mother's lack of self-control is her perceived reproductive conduct. Rhetoric about the legislative need to ensure fiscal responsibility seems to be accompanied by the unstated goal of keeping certain women from reproducing. Which women? Those that keep irresponsibly having babies, those who are on welfare. The underlying motivation for the Norplant bills is similar to that which informed the eugenic measures designed to prevent women with undesirable traits from reproducing: "The intense competition for tax dollars has merely replaced genetic considerations with fiscal and psychological ones."<sup>313</sup>

Targeting welfare mothers to reduce the tax burden is motivated by the persistent but inaccurate notion that mothers on welfare have more children in order to increase their welfare payments; this has been called the "brood-sow myth."<sup>314</sup> According to this para-

TIMES, Feb. 4, 1992, at A6, available in LEXIS, Nexis Library, SEATTM File.

311. *Id.*

312. 60 Minutes, *supra* note 222, at 10. Similarly, Senator Rick Dantzler of Florida, who contemplated forcing women to be implanted with Norplant as a condition for receipt of welfare benefits, stated: "I see us coming apart at the seams morally. . . . My constituents are tired of paying for other people's irresponsibility. It's time for radical kind of talk." Ash, *supra* note 297 (quoting Sen. Rick Dantzler).

313. Monroe E. Price & Robert A. Burt, *Sterilization, State Action and the Concept of Consent*, 1 L. & PSYCHOL. REV. 57, 59-60 (1975). The authors note too that

[f]orms of state control and intervention change and become so sophisticated, appealing, subtle, and delicate that modern governmental action seems to be less and less restricted by an ordinary application of constitutional protections.

*Id.* at 59.

314. Paul J. Placek & Gerry E. Hendershot, *Public Welfare and Family Planning: An Empirical study of the "Brood Sow" Myth*, 21 SOC. PROB. 658, 668 (1974). Dorothy Roberts notes: "The myth of the Black Jezebel has been supplemented by the contemporary image of the lazy welfare mother who breeds children at the expense of taxpayers in order to in-

digm, women on welfare are out-of-control reproducers in need of regulation. The Norplant bills reflect and perpetuate the image of women on welfare as lacking self-control (perpetually pregnant) and yet as repsonsible and culpable (calculatedly engaging in money-making activities without regard for others).<sup>315</sup> While the formal rationale for the Norplant-for-pay initiatives is that they will reduce the welfare rolls by controlling the "brood-sow," research has refuted the contention that women on welfare have children to increase their payments.<sup>316</sup> Moreover, Norplant may actually put an additional strain on the welfare system. To qualify for the Norplant payments one must be and stay on welfare. Statistically, however, most welfare recipients do not remain on welfare for uninterrupted or lengthy periods of time.<sup>317</sup> Thus the allure of quick cash may ac-

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crease the amount of her welfare check." Roberts, *supra* note 35, at 1444. See also Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1515 (1991) ("The cultural stereotype of the female-headed household receiving public assistance has evolved from the image of the white widow to the image of the black welfare mother.").

315. The common perception of welfare mothers is highly negative:

You give those lazy, shiftless good-for-nothings an inch and they'll take a mile. You have to make it tougher on them. They're getting away with murder now. You have to catch all those cheaters and put them to work or put them in jail. Get them off the welfare rolls. I'm tired of those niggers coming to our state to get on welfare. I'm tired of paying their bills just so they can sit around home having babies, watching their color televisions, and driving cadillacs.

Roberts, *supra* note 35, at 1444 n.133 (quoting MILWAUKEE COUNTY WELFARE RIGHTS ORG., WELFARE MOTHERS SPEAK OUT 72-92, 72 (1972)).

316. DOROTHY C. MILLER, WOMEN AND SOCIAL WELFARE 31 (1990) ("AFDC has no impact upon the incidence of child-bearing among unmarried women) (citing DAVID T. ELLWOOD & MARY JO BANE, THE IMPACT OF AFDC ON FAMILY STRUCTURE AND LIVING ARRANGEMENTS 5, 6-7 (1985)); William A. Darity, Jr. & Samuel L. Myers, Jr., *Does Welfare Dependency Cause Female Headship? The Case of the Black Family*, 46 J. MARRIAGE & FAM. 765, 773 (1984) (finding that "[t]he attractiveness of welfare and welfare dependency exhibits [sic] no effects on black female family heads."); Placek & Hendershot, *supra* note 314, at 668 (finding that welfare payments do not motivate women to bear more children); Harriet B. Presser & Linda S. Salsberg, *Public Assistance and Early Family Formation: Is There a Pronatalist Effect?* 23 SOC. PROB. 226, 230-31 (1975) (finding that mothers receiving AFDC were less likely to desire additional children than mothers not receiving public assistance); Williams, *supra* note 82, at 739, 739 n.130 (citing studies finding no correlation found between child-bearing decisions—even the decisions of young unmarried women—and receipt of AFDC benefits); Maxine Baca Zinn, *Family, Race, and Poverty in the Eighties*, 14 SIGNS 856, 863-84 (1989) (citing studies that refute the proposition that the payment of AFDC benefits "make it desirable to forgo marriage and live on the dole"); but see CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980, at 154-66 (1984) (arguing that the availability of assistance induces women on AFDC to have multiple pregnancies).

317. SAR A. LEVITAN & CLIFFORD M. JOHNSON, BEYOND THE SAFETY NET: REVIVING THE PROMISE OF OPPORTUNITY IN AMERICA 37 (1984) (discussing data from 1979 and reporting that "nearly three of every ten AFDC families had received welfare benefits for less than one year, and a majority of families had remained on the rolls for less than four

tually increase a women's incentive to remain on welfare. Despite the extant reasons to doubt the wisdom of the Norplant bills, even taken on their own terms, such reasons seem to lack the power of the prejudices and internalized images that gave rise to the bills.<sup>318</sup>

The Norplant bills targeting welfare mothers implicitly convey the message that the State equates welfare mothers with bad mothers, not unlike child abusers. State action targeting female welfare recipients is punitive in a sense similar to a probation condition. Such action represents an administrative judgment, similar to judicial judgment, about a woman's maternal fitness. It has been noted that "once the government involves itself deeply in the economic and social life of its citizens . . . the state is in a position to manipulate its citizens as effectively by withholding largesse as by threatening prison."<sup>319</sup> The Norplant incentive scheme dispenses allocative sanc-

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years. Fewer than 8 percent of all AFDC families had received assistance without interruption for more than ten years."); Richard D. Coe, *Welfare Dependency: Fact or Myth*, CHALLENGE, Sept.-Oct. 1982, at 43, 45 (finding that 48.8 percent of all welfare recipients received welfare for only one or two of the ten year period covered by the study). The population that would be affected by many of the Norplant measures, however, is the population most at risk for long-term welfare dependency: "[n]ever-married women under age 25 who begin receiving AFDC when their youngest child is less than three years old." Miller, *supra* note 316, at 30.

It is speculative at best, however, whether the measures would have the influence on behavior that their drafters intended. If there is no correlation between the number of pregnancies a woman has and the availability of public assistance, *see supra* note 316, would a disincentive to pregnancy appreciably affect the welfare rolls? Moreover, given that much of the welfare population is only intermittently on welfare, a Norplant measure offering money for every year the woman keeps the implant in—presumably for at least five years and longer if a woman is implanted more than once—might encourage women to remain on welfare when they might otherwise not.

318. *See* Williams, *supra* note 82, at 743 n.155 noting a 1990 study which reported that "62% of whites thought African Americans tended to be lazy, while 54% thought Hispanics likely to be lazy. Seventy-eight percent thought African Americans and 72% thought Hispanics preferred to live off welfare." (citing TOM W. SMITH, NATIONAL OPINION RESEARCH CENTER, UNIVERSITY OF CHICAGO, *ETHNIC IMAGES* 9 (1990)). On debunking welfare myths, *see generally* MARIAN WRIGHT EDELMAN, *FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE* 68-77 (1987); THEODORE R. MARMOR, *AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES* (1990).

319. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1395-96 (1984). Kreimer examines "the question of what conditional allocations may be said to be threats that reduce the autonomy guarded by constitutional liberties, and, second, the question whether an allocation, be it threat or offer, should be viewed as an impermissible effort by government to induce sale of inalienable rights." *Id.* at 1396.

Similarly, Charles A. Reich observes:

If benefits necessary to the survival of the individual are the property of the government then these benefits become an instrument of social control. The government can impose conditions, supervise the behavior of the recipients, or deny them the control over their lives that most other citizens are granted.

Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOK.

tions. It is fitting that the word "sanction" means both penalty and reward,<sup>320</sup> while the rhetoric surrounding the welfare measures maintains that women are "rewarded" for Norplant implantation with cash bonuses, it could also be said that these women are being "punished" for bad (irresponsible, out-of-control) reproductive behavior.

Mothers on welfare, child abuse probationers and "feeble-minded" women, form the skeleton of the "bad mother." The "bad mother" is given shape by judges and legislators who draw on the pool of "component characteristics." The presence of one "bad" component is, as noted previously, considered a sign of the presence of others. Thus drug use, irresponsibility, criminality, welfare receipt and single motherhood are all interchangeable characteristics.<sup>321</sup>

The non-individuation of the woman on welfare and the child abuser has significant consequences. The female child abuser sentenced to Norplant and the poor woman targeted by a Norplant bill is each prevented from having children as punishment for perceived abuse—either of their children or of the welfare system, or both.<sup>322</sup>

L. REV. 731, 738 (1990).

320. While sanctions are generally imagined as penalties, they can also assume the form of a reward. *Black's Law Dictionary* defines "sanction" as:

A penalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules or regulations. That part of a law which is designed to secure enforcement by imposing a penalty for its violation or offering a reward for its observance.

BLACK'S LAW DICTIONARY 1341 (6th ed. 1990).

321. See, e.g., Mertus & Heller, *supra* note 17, at 378 ("[S]terilization proposals of the early 1920s had already grouped low income people with the feeble-minded insane and criminal among the categories of socially inadequate for whom forced sterilization should be permitted."); Ross, *supra* note 314, at 1505 n.19 (citing findings that poor people and criminals have often been classified together); Fineman, *supra* note 151, at 283 ("Recently poverty discourses emanating from a broad spectrum of groups, single mothers have been lumped together with drug addicts, criminals, and other 'socially defined 'degenerates' in the newly-coined category of the 'underclass.'"); Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 872-73 (1971) ("At common law, [c]ourts classified women with children and imbeciles, denying their capacity to think and act as responsible adults and enclosing them in the bonds of paternalism.").

322. Poor women are likely to be treated more harshly by the criminal justice system. Clarice Feinman cites two studies both of which demonstrate that the criminal justice system is biased against poor, minority women. One study showed that "white women who exhibit appropriate sex-role behavior" were accorded more "chivalrous treatment" by law enforcement. Feinman, *supra* note 151, at 31 (citing Christy Visser, *Gender, Police Arrest Decisions, and Notions of Chivalry*, CRIMINOLOGY, Feb. 1983, at 21, 22-23). The other study found that "[l]ower status women, those who are ex-offenders, those who are economically disadvantaged, and especially those on welfare receive harsher sentences than women who are employed, who work toward a goal such as fulfilling their duties as wives and mothers, or students." *Id.* (citing Candace Kruttschnitt, *Social Status and Sentencing of Female Offenders*, 15 LAW & SOC'Y REV. 256-59 (1980-81)).

This conflation is sometimes made explicit; one Senator considering introducing a Norplant bill stated: "Children born to single-parent families, children reared without 'paternal influence,' are tomorrow's criminals."<sup>323</sup> This Comment reveals that single motherhood is equated with welfare receipt, and that both are cues for criminality.

The public welfare laws of several states facilitate the blurring of distinctions between individuals. To illustrate, the Kansas social welfare code which established Kansas' welfare program is directed at "all phases of dependency, defectiveness, delinquency and related problems."<sup>324</sup> As justification for their joint appearance, it might be said that delinquency, deficiency and defectiveness *are* related problems—that they can be found in a single individual. Yet the failure of the law to make distinctions enables the perpetuation of myths—for instance, the myth that people on welfare are "delinquent." Here legislation facilitates a thought process similar to that extant in the judicial opinions discussed earlier.

It is true that social welfare laws group dependents, defectives and delinquents together as those "in need of assistance," and are thus to be distinguished from laws employing similar classifications for eugenic purposes.<sup>325</sup> But while there are significant differences between these types of legislation, the eugenic sterilization laws were also ostensibly enacted for the good of those subjected to them. Given what has been "joined" historically, what characteristics are likely to be perceived as fitting within the "related problems" language of the Kansas Code? Recall that it was the Kansas legislature that first considered a Norplant measure for welfare women, and that that legislation was proposed as an Act under Kansas' Social Welfare Code.

The characteristics the welfare context shares with the probation context make it an unsurprising arena for Norplant initiatives. The welfare context allows for increased restrictions—welfare recipients are already highly regulated.<sup>326</sup> Like probationers, welfare

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323. Ash, *supra* note 297.

324. KAN. STAT. ANN. § 39-708c(t) (1986); *see also* ARIZ. REV. STAT. ANN. § 46-134(2)(7) (1988); ARK. CODE ANN. § 20-76-201(b)(7) (Michie 1991); HAW. REV. STAT. § 346-18(8) (Supp. 1992); ME. REV. STAT. ANN. tit. 22, § 7 (West 1992); MINN. STAT. ANN. § 246.12 (West Supp. 1993); N.M. STAT. ANN. § 27-1-3(K) (Michie 1992); TENN. CODE ANN. § 71-1-105(7) (1987); *but see* N.H. REV. STAT. ANN. § 161:2 (1990) (where in 1979 the legislature deleted the words "delinquent" and "defective").

325. Mertus & Heller, *supra* note 17, at 378.

326. For examples of cases which have considered the scope of conditions or limits a state may impose on public assistance, *see, e.g.*, Lewis v. Martin, 397 U.S. 552 (1970) (holding that a state could not count as income money from the man with whom AFDC recipient cohabitated if he had no legal obligation to make payments); King v. Smith, 392 U.S. 309 (1968) (holding that state could not disqualify woman from receiving AFDC because she cohabitated with man who was not obligated to pay child support); Dandridge v.

recipients are in a poor bargaining position; they are asking for something. Because the State is already giving out "hard-earned" tax dollars, it feels it can ask for something in return, or attach conditions to what it gives. Women thus situated are presented with the choice of being implanted with Norplant, foregoing the extra money, or, under some proposed plans, foregoing public assistance altogether.

The rhetoric of choice was also deployed to defend the Norplant probation condition; women could choose between probation and jail. Judge Broadman said that Darlene Johnson *chose* Norplant. *In re Cavitt* stated that the institutionalized woman could choose her release or sterilization.<sup>327</sup> The rhetoric of choice is used to help obscure the myths and rationales behind Norplant incentive schemes, shifting the focus from cutting costs at the expense of a politically marginalized group (this measure is meant to preserve tax dollars) to a beneficent state protecting its vulnerable. As Judge Broadman maintained, the Norplant condition would alleviate Johnson's stress so that she could become a better mother.<sup>328</sup> Representative Patrick's defense of his incentive bill strikes a similar chord:

Why not try a program with an incentive? Why not give the welfare woman a choice? Why not empower her to make the decision as to whether or not she should use Norplant? . . . If . . . we can avoid the welfare recipient from having that second pregnancy, she can get the job skills, she can get the education, then the Norplant is removed and she can be equipped to take care of a child.<sup>329</sup>

Here "empowerment"—the liberating rhetoric of the women's and civil rights movement—is coopted to wrest reproductive control from disempowered women. What is freed, however, is not the woman on welfare. What is freed are the resources of the State.

In sum, the Norplant measures reflect and perpetuate the "bad mother" construction. Since what has been identified as reflecting the bad behavior is the mothering, the Norplant measures' focus is control of the expression of that "badness." Thus, Norplant is enlisted to serve the myth that the "logical" avenue for controlling women's

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Williams, 397 U.S. 471 (1970) (upholding constitutionality of cap on AFDC benefits for large families, regardless of need); *Bowen v. Gilliard*, 483 U.S. 587 (1987); *Wyman v. James*, 400 U.S. 309 (1971) (holding that requirement that welfare recipient submit to search of home as condition of receipt of benefits was not a violation of fourth amendment rights). See also Ross, *supra* note 291, at 1518-26 (revealing the implicit moral assumptions about poor people made by the Supreme Court in *Dandridge* and *Wyman* among other cases). See also Coale, *supra* note 9, at 204-14 (arguing that the Norplant bonus schemes constitute an unconstitutional condition).

327. See *supra* notes 70-72 and accompanying text.

328. Motion to Modify, *supra* note 181, at 21.

329. 60 Minutes, *supra* note 222, at 9-10.



undesirable behavior is their reproductive capacity. This is achieved through taking many small, each on its own seemingly insignificant, steps. The woman who receives public assistance is associated with "incompetents" and "criminals"—with irresponsibility. Evidence of the welfare mother's irresponsibility is the reproductive behavior that is perceived to impinge on the taxpayer. Thus conceived, remedies enforcing procreative control take on the cast of rationality—the punishment seems perfectly to fit the crime.

### III. RETHINKING NORPLANT: THE DYSFUNCTION OF MYTH

*For the 27-year-old Los Angeles woman, the offer was too tempting to refuse: five years of contraception provided free of charge, with follow-up health exams tossed in, too. . . . But shortly after the Filipino woman agreed to have Norplant inserted in her arm as part of a doctor's training session, she began to bleed heavily. Then her hair began to fall out and the acne appeared. And when she called the hospital to have the capsules removed, she was told it would cost \$150. . . . 'I was shocked. No one ever told me it would cost to have it taken out,' said the woman, who still has the capsules in her arm. 'No way I had that money. I live dollar to dollar.'*<sup>330</sup>

When a myth is perceived to be more fact than fiction, its presence may prevent different visions of reality from being voiced.<sup>331</sup> There is arguably much "fact" at the heart of the myths that inform the Norplant measures and pervade the contexts this Comment has discussed. It can be difficult to recognize that there are different versions of the truths ascribed to myths. This Part suggests that there are other tales of the "reality" of Norplant that might be told.

#### A. *Norplant's Health Risks and Lack of User Control*

Norplant was tested on approximately fifty-five thousand women in forty-four countries in clinical and pre-introduction trials before it was approved for marketing in the United States.<sup>332</sup> Also

330. Sally Jacobs, *Norplant Draws Concerns Over Risks, Coercion*, BOSTON GLOBE, Dec. 21, 1992, at 1, available in LEXIS, Nexis Library, BGLOBE File.

331. Ruth Hubbard writes:

It is important to be aware that the ideology of woman's nature can differ drastically from, and indeed be antithetical to, the realities of women's lives. In fact, the ideology often serves as a smokescreen that obscures the ways women live by making people (including women) look away from the realities or ask misleading questions about them.

Ruth Hubbard, *Social Effects of Some Contemporary Myths About Women*, in WOMEN'S NATURE: RATIONALIZATIONS OF INEQUALITY (Marian Lowe & Ruth Hubbard eds., 1983).

332. NORPLANT CONSUMER INFORMATION, *supra* note 166, at 3; U.S. FOOD & DRUG ADMIN., VERBATIM TRANSCRIPT OF FERTILITY AND MATERNAL HEALTH DRUGS ADVISORY COMMITTEE MEETING, Apr. 27, 1989, at 132 [hereinafter ADVISORY COMMITTEE MEETING]. The first study of Norplant began in 1974, in Santiago, Chile. *Id.* at 91. It has recently

prior to its approval, the Food and Drug Administration's Fertility and Maternal Health Drugs Advisory Committee convened for hearings on Norplant's safety and effectiveness.<sup>333</sup> Members of the public were invited to address the Committee at its April 28, 1989 meeting, and several organizations counseled against approving Norplant.<sup>334</sup> Two concerns were frequently expressed: that the long term risks of Norplant were not yet adequately known,<sup>335</sup> and that Norplant's lack of user control over the device presented potential problems if women were not able to obtain prompt removal of the device.<sup>336</sup>

A representative of the National Women's Health Network insisted that approval would be "premature"<sup>337</sup> and urged: "Our primary concern is the lack of data on long term safety. Although we are fully aware of how expensive it is to conduct clinical trials for 15 years or longer, we believe such studies should be carried out during the pre-marketing phase, rather than post-marketing."<sup>338</sup> Similarly, Health Action International-U.S.A., an organization comprised of consumer, environmental and women's health groups, recommended that Norplant not be approved and advised that it be studied for at least fifteen years in order to accumulate more safety data.<sup>339</sup>

In addition to Norplant's possible health risks—known and still unknown—additional questions were raised concerning Norplant's design and its lack of user control.<sup>340</sup> The National Women's Health Network noted that some reports from clinical trials indicated that certain "women were not able to obtain prompt removal [of Norplant] upon request."<sup>341</sup> At least one woman who was refused her request for removal of the device reportedly "cut the capsules out of her own arm because she had no other choice."<sup>342</sup> The concern was voiced that if a woman was not able to have the capsules removed after the five year period, she might face increased health risks.<sup>343</sup> In

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been estimated that 1.8 million women world-wide use Norplant implants. *Norplant Use Increasing, Report Says*, UPI, Jan. 11, 1993, available in LEXIS, Nexis Library, UPI File [hereinafter *Norplant Use Increasing*].

333. ADVISORY COMMITTEE MEETING, *supra* note 332.

334. *See generally id.* at 9-30.

335. *See id.* at 17, 20-21, 23.

336. *See id.* at 18, 21-22, 24-26.

337. *Id.* at 17.

338. *Id.*

339. *Id.* at 21.

340. *Id.* at 25 ("The greatest problem with Norplant is the complete loss of user control . . ."). The Committee was informed of reports that women in Bangladesh, Sweden, Brazil and Ecuador were having difficulty getting Norplant removed. *Id.*

341. *Id.* at 18.

342. *Id.* at 25.

343. The Health Action International-U.S.A. also pointed out that Norplant's lack of user control gave rise to several as yet unanswered questions and asked the Committee to consider: "Do women always have access to providers with the necessary skills to insert

short, a woman implanted with Norplant depends entirely on others' willingness and competence to monitor and remove the device, and past experience has shown that such benevolent treatment has not always been forthcoming. A National Women's Health Network spokesperson explained:

Many women, especially poorer women and women of color, who have had difficulty obtaining high-quality responsive health care in the past, justifiably are skeptical that the health and medical care system will suddenly become reliable; i.e. that care givers actually will be trained adequately in insertion and removal techniques as and that all requests for implant removals will be immediately honored.<sup>344</sup>

Despite the prevailing reservations about Norplant, the Advisory Committee voted unanimously to approve Norplant for marketing in the United States.<sup>345</sup> Not only were the fifteen year studies some women's and health organizations thought imperative not performed before approval, but the FDA also "hinted" that its testing requirements would be "eased" because the costs of the ten-year monkey studies and seven-year dog studies demanded by the FDA were prohibitively expensive for the Population Council, Norplant's sponsor.<sup>346</sup>

Since Norplant was approved, additional information has suggested that the concerns over Norplant's safety and potential for abuse were well-founded. While most of the published accounts in

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and remove the rods?; What are the risks of ectopic pregnancy? And what are these risks if the women do not have the rods removed after five years?" *Id.* at 21-22.

Women's fear of the removal procedure may also cause them to delay removal, perhaps indefinitely. See Paolo Marangoni et al., *Norplant Implants and the TCU 200 IUD: A Comparative Study in Ecuador*, 14 *STUD. FAM. PLAN.* 177, 180 (June-July 1983) ("In our view, it would be wrong to be content with the low termination rate due to menstrual problems. We believe that the rate would have been much higher if it had been easier to remove the implants. In other words, there is a balance between distress caused by the menstrual problems and the fear of the removal procedure.").

344. ADVISORY COMMITTEE MEETING, *supra* note 332, at 18; See also HARTMANN, *supra* note 80, at 198 (predicting that in Third World countries women would have difficulty obtaining prompt removal of Norplant).

345. ADVISORY COMMITTEE MEETING, *supra* note 332, at 183. After hearing from the public, the Advisory Committee was presented with data from several clinical trials of Norplant, and Norplant's safety and effectiveness were discussed. The Committee was unanimous in pronouncing Norplant effective, *id.* at 164, finding that Norplant was "at least as safe a contraceptive as the other hormonal contraceptives currently on the market." *Id.* at 179-80. It determined that issues such as "bleeding, metabolic effects, and ease of removal [had] been adequately addressed," *id.* at 180, and that there were "no other safety issues . . . which . . . need[ed] to be resolved." *Id.* at 181.

346. Doug Podolsky & Marjory Roberts, *Sorry, Not Sold in the U.S.*, *U.S. NEWS & WORLD REP.*, Dec. 24, 1990, at 65. For a description of the FDA approval process see Stephen L. Isaacs & Renee Holt, *Drug Regulation, Product Liability, and the Contraceptive Crunch*, 8 *J. LEGAL MED.* 533, 534-38 (1987).

the United States report that women's reactions to Norplant have been generally positive,<sup>347</sup> there have been reports from other countries indicating that Norplant use may, in fact, produce long-term and potentially fatal complications. According to Ines Smyth of Oxford University, if it is not removed after five years, Norplant creates a severe risk of ectopic pregnancy<sup>348</sup> which can result in sudden death by massive internal hemorrhaging.<sup>349</sup> Human Defense Network researchers, in interviews with fifty Norplant users, found that forty-eight suffered from health-problems.<sup>350</sup> A lawyer in Sweden is reported to be representing twelve women allegedly injured by the Norplant device.<sup>351</sup>

While FDA approval does not guarantee a product's safety, once a product is FDA-approved it becomes cloaked with an assurance of safety that may lead consumers to underestimate its risks.<sup>352</sup> Other

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347. See, e.g., Barbara Kantrowitz & Pat Wingert, *The Norplant Debate*, NEWSWEEK, Feb. 15, 1993, at 37, 41; but see, Sarah E. Samuels & Mark D. Smith, *Executive Summary*, in NORPLANT AND POOR WOMEN, *supra* note 17, at ix (noting that almost twenty-five percent of American women implanted with Norplant have requested early removal.)

348. An ectopic pregnancy occurs when the fertilized egg develops in the fallopian tubes, rather than the uterus. THE NEW OUR BODIES OURSELVES, *supra* note 203, at 427. Surgery must be performed before the tube ruptures. *Id.* at 210. The prescribing information that accompanies the Norplant system kit notes that the rate of ectopic pregnancies in women using Norplant has not been shown to be higher than in non-contraceptive users, but acknowledges that the rate of ectopic pregnancy may increase with the duration of Norplant use. NORPLANT PRESCRIBING INFORMATION, *supra* note 177.

349. Dave Todd, *Expert Sounds Alarm on Indonesian Birth-control Program*, THE MONTREAL GAZETTE, Nov. 26, 1991 at A1 available in LEXIS, Nexis Library, MONGAZ File; see also *Norplant Risks Played Down by Population Group*, THE MONTREAL GAZETTE, Nov. 27, 1991, at A16 available in LEXIS, Nexis Library, MONGAZ File (spokesperson for Population Council disputes that there is a severe risk of ectopic pregnancy). Interestingly, this story, which appeared in several Canadian newspapers, was never, to my knowledge, printed in a single United States paper. It is perhaps relevant that Canada has not approved Norplant for domestic use. *Id.*

350. *Brazilian Women Concerned Over Marketing of Norplant in United States*, Notimex Mexican News Service, Feb. 16, 1992, available in LEXIS, Nexis Library, NOTMEX File. The text of that report stated that 3,500 Brazilian women used the contraceptive experimentally from 1984 to 1986, at which time the Brazilian Health Ministry suspended the experiment due to reports of complications and unpleasant side effects. *Id.* One woman who used Norplant in 1985 reportedly continues to experience side effects. *Id.*

351. ADVISORY COMMITTEE MEETING, *supra* note 332, at 24.

352. See Judgment Proceedings, *supra* note 154, at 7 (Judge Broadman represented Norplant's safety by telling Johnson that it was FDA approved and not experimental); See generally NICOLE J. GRANT, *THE SELLING OF CONTRACEPTION: THE DALKON SHIELD CASE, SEXUALITY, AND WOMEN'S AUTONOMY* (1992) (discussing the risks of various birth control devices and providing evidence that frequently such devices are mistakenly thought to be safer than they later turn out to be and documenting the frequency with which known risks are not fully disclosed).

The government's ability, via the FDA, to release or not release, adequately test or

FDA-approved products have later turned out to be defective and injurious to the health of the women that use them. The injuries sustained by women who received silicone breast implants<sup>353</sup> and who used the Dalkon Shield and the Intra-Uterine Device (IUD) are illustrative.<sup>354</sup>

The anticipated Norplant removal problems are also occurring. The research by the Human Defense Network disclosed that "[w]omen's and health groups found that many doctors in the research project did not examine patients thoroughly before implanting Norplant, and abandoned the patients instead of removing the contraceptive after the experiment was concluded."<sup>355</sup> One Norplant implantee was told by her doctor that he would take out one of the six capsules for seventy-five dollars, and that she would have to return when she had the money to remove the rest.<sup>356</sup> A spokesperson from the Native-American Women's Health Education Resource

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ignore health risks, gives it tremendous power over its citizens' health. See generally BELINDA BENNETT, *LEGAL NARRATIVES: FROM COMSTOCKERY TO THE FOOD AND DRUG ADMINISTRATION*, 4 INST. LEGAL STUD. (1989) (critiquing drug regulation as a form of paternalistic control over women as well as providing a feminist critique of regulatory practices and failures illustrated by the Dalkon Shield, IUD and DES tragedies). In addition, the regulatory process is one to which most people do not have access, which allows the government to make decisions without public scrutiny. Although the public is sometimes given a chance to air its views, as in the Advisory Committee meetings on Norplant, there are no rules about the weight that Committee must give to those views. For a discussion of the role of the Advisory Committee in the FDA approval process, see William Green, *The Odyssey of Depo-Provera: Contraceptives, Carcinogenic Drugs, and Risk Management Analyses*, 42 FOOD DRUG COSM. L.J. 567, 571 (1987).

353. See, e.g., Earl Lane, *Conditional OK; Panel: Lift Ban on Breast Implants but Restrict Use for Cosmetic Reasons*, NEWSDAY, Feb. 21, 1992, at 4. "Only after a number of women successfully sued breast implant manufacturers did the U.S. Food and Drug Administration investigate the industry and ultimately warn the public of the dangers of this product." Jane Tschida, *Legal System Proves its Worth in Implant Scandal*, STAR TRIB. (Minneapolis), Feb. 26, 1992, at 13A.

354. "According to Doris Haire, Chair of the Committee on Health Law and Regulation of the National Women's Health Network, 'the power and the inclination of the FDA to protect women is still very limited. The FDA still defines 'safe' as a relative term, based on . . . what the FDA considers to be the acceptable potential risks and benefits of the particular drug.' The FDA still relies on manufacturers to submit data on safety prior to the drug's approval. Once a drug is marketed, the FDA relies on manufacturers and physicians—who have vested interests in avoiding liability for injury—to report adverse reactions." GRANT, *supra* note 326, at 150; see generally WOMEN'S HEALTH: READINGS ON SOCIAL, ECONOMIC AND POLITICAL ISSUES (Nancy Worcester & Marianne Whatley eds., 1988); SUSAN PERRY & JIM DAWSON, NIGHTMARE: WOMEN AND THE DALCON SHIELD (1985); Walter Lee McCombs & James F. Szaller, *The Intrauterine Device*, 24 CLEV. ST. L. REV. 247 (1975).

355. *Brazilian Women Concerned Over Marketing of Norplant in United States*, *supra* note 324. See also *Norplant Risks Played Down by Population Group*, *supra* note 349 (spokesperson for Population Council concedes that Indonesian government has "been slow to set up removal programs").

356. Jacobs, *supra* note 330. See also Samuels & Smith, *supra* note 347, at xi-xii.

Center in South Dakota stated that "she has heard from dozens of Native American women who say they were not advised about the side effects associated with Norplant. And when some of them have sought to have the capsules removed, their doctors discouraged them or flat out refused."<sup>357</sup> The Center has received one hundred calls from Norplant users describing their experiences with the device, and approximately one third of the calls concerned problems with removal.<sup>358</sup> The Center is considering filing a lawsuit over the device.<sup>359</sup>

Lack of user control has enabled Norplant to be abused in some countries, usually in the name of population control. Indonesia, for instance, imposes birth-control quotas, and punishes villages that fail to meet them.<sup>360</sup> "Safaris" are conducted in which military and public health officials sweep into villages and look for women to implant with Norplant.<sup>361</sup> To compel compliance, Indonesian authorities control access to goods and services such as "fertilizer and agricultural facilities," and on Indonesia's tea plantations, "women are denied work unless they have a registration card stating that they have agreed not only to birth control, but a particular kind, determined by the authorities."<sup>362</sup> There have even been reports of women coerced at gunpoint.<sup>363</sup>

While it may seem improbable that similarly coercive measures would occur in the United States,<sup>364</sup> government mandated popula-

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357. Jacobs, *supra* note 330.

358. *Id.*

359. *Id.* The Director of the National Latina Health Organization in Oakland, California said she has spoken with women "who felt pressured into using Norplant." *Id.*

360. Todd, *supra* note 349. See also Leah Makabenta, *Indonesia: Population Success Story has Shady Side*, Inter Press Service, Nov. 5, 1992, available in LEXIS, Nexis Library, IPS File.

361. *Id.* See also Arthur Caplan, *The Norplant Safaris—Birth-Control Implant Leads to Population Control by Governments*, SEATTLE TIMES, July 7, 1991, at A13, available in LEXIS, Nexis Library, SEATTM file.

362. Todd, *supra* note 349. See also HARTMANN, *supra* note 80, at 16-19, 234-37 for documentation and discussion of coerced sterilizations in India, Brazil and Bangladesh.

363. Todd, *supra* note 349.

364. Ruth Dixon-Mueller describes U.S. international population policy in the 1960s and 1970s as "driven by crisis." Ruth Dixon-Mueller, *The Woman Question*, 20 N.Y.U. J. INT'L. L. & POL. 143, 163 (1987). At this time, there was "overzealous recruitment" of women to accept birth control, "sometimes leading to gross violations of the principles of voluntarism and informed choice." *Id.* at 164. One might say that the current compulsion to punish women, and to direct that punishment at their reproductivity, is a response to our "crisis" situation with crime, drug abuse, and violence in families. This response to today's problems is strikingly similar, both in form and motivation, to the abuses we hear of in other countries, but think could never happen here. Dr. Sheldon J. Segal who helped develop Norplant thought that it might be put to coercive and punitive use, but he was "worrying about China, not California." Ellen Goodman, *Birth Control—or Woman Control?*, NEWSDAY, Feb. 19, 1991, at 38, available in LEXIS, Nexis Library, NEWSDY File.

tion control illustrates the degree to which reproduction can serve as a vehicle for social control.<sup>365</sup> The above instances, as well as the past experiences in this country,<sup>366</sup> indicate that such fear is logical.

Norplant is also emblematic of the alienation of women from the technology intended to liberate them. Some have argued that as reproductive technology advanced during the 1960s, the medical community became more involved in women's childbearing and individual women lost some control over procreation.<sup>367</sup> In particular, the issues surrounding Norplant's lack of user control resemble issues that surrounded the IUD in the 1960s. An early FDA report on the device remarked:

Rebirth of interest in the intrauterine devices (IUDs) as an effective, acceptable method of contraception stems from two factors. . . [one of which] is the suggestion that the underprivileged woman is more effectively served when the need for recurrent motivation, required in most other forms of contraception, is removed.<sup>368</sup>

This passage illustrates the assumption that "underprivileged" women are less likely to be "motivated," and thus are perfect candidates for a birth control device that requires no user participation

365. For feminist analyses of United States population control practices see, e.g., HARTMANN, *supra* note 80; Virginia Gray, *Women: Victims or Beneficiaries of U.S. Population Policy?*, in POLITICAL ISSUES IN U.S. POPULATION POLICY 167-87 (Virginia Gray & Elihu Bergman eds., 1974); Sandra Schwartz Tangri, *A Feminist Perspective on Some Ethical Issues in Population Programs*, 1 SIGNS 895 (1976).

Coercive population control policies, like coerced contraception, have also come under attack from those who fear that the government's aim in promoting such policies is to commit racial genocide. See, e.g., THOMAS B. LITTLEWOOD, *THE POLITICS OF POPULATION CONTROL* 49-53, 69-87 (1977); J. Mayone Stycos, *Some Minority Opinions on Birth Control*, in POPULATION POLICY AND ETHICS: THE AMERICAN EXPERIENCE 169 (Robert M. Veatch ed., 1977).

366. See, e.g., *supra* notes 82-87 and *infra* notes 355-59 and accompanying text.

367. GRANT, *supra* note 352, at 10, 14. "As the control of health care passed from a community of women to physicians and the state, autonomous control of procreative power by women was increasingly eroded." *Id.* at 10; see also Datha Clapper Brack, *Displaced—The Midwife by the Male Physician*, in BIOLOGICAL WOMAN—THE CONVENIENT MYTH 207-09 (Ruth Hubbard et al. eds., 1982) (discussing the dominance of the medical profession over childbirth); see generally GENA COREA, *THE MOTHER MACHINE* (1984) (arguing that much of reproductive technology serves to exploit women); but see Stanworth, *supra* note 34, at 288-89 (cautioning that rejecting reproductive technology because it represents the scientific communities' control over women's reproduction may encourage women's realignment with nature—i.e., the nontechnological—an association which has been detrimental to women).

368. GRANT, *supra* note 352, at 23 (quoting U.S. FOOD & DRUG ADMIN. ADVISORY COMM. ON OBSTETRICS & GYNECOLOGY, DOC. NO. 362-666-0-69-2, SECOND REPORT ON ORAL CONTRACEPTIVES 13 (1969)). The report also indicates that the Committee believed that the "use-effectiveness" of the IUD method of contraception was high because it required the least motivation and least control on the part of the woman. See *id.* at 23-24.

once implanted.<sup>369</sup> Moreover, as with Norplant, some saw the IUD as well-suited for "a government-financed scheme in which it was in a woman's economic interest to have a device inserted and to keep it there (or failing that, to have one re-inserted) . . ."<sup>370</sup> This link of implanting technology in women thought unable to control their own reproduction with the association of poor women as particularly in need of this control, was as evident with the IUD as it is with Norplant.<sup>371</sup>

Presently, unknown health risks are "chosen" by women opting for Norplant. While no contraceptive device is risk free,<sup>372</sup> there are alternative contraceptives available that pose fewer or none of Norplant's risks.<sup>373</sup> Yet the rhetoric surrounding the Norplant device sings its praises, with little if any discussion of risks beyond the type of side effects to be expected with other hormonal contraceptives.

## B. *Rethinking the Norplant Measures*

1. *The Bad Mothers Revisited.* "Examining legal issues from the viewpoint of whom they affect most helps to uncover the real reasons for state action and to explain the real harms that it causes."<sup>374</sup> When myths about the nature of "bad mothers" are promulgated, some arguably relevant aspects of the women are not mentioned and parts of their stories are omitted—in the way that it was not made clear at the time of her sterilization that Carrie Back's pregnancy was the result of rape.<sup>375</sup> Debra Forster,<sup>376</sup> for instance, came from an

369. See HARTMANN, *supra* note 80, at 167-68 (outlining "contraceptive biases" including the bias towards funding hormonal methods of birth control, in large part because they "require little initiative by the user and minimal interaction between the user and the provider"); Ferigna et al., *supra* note 261, at 59 ("Studies show that many doctors assume poor women are not capable of using methods that require high user compliance, such as oral contraceptives, despite the fact that such assumptions are not founded on fact.") (citing *Poor Women Good Pill Users, Study Finds*, FAM. PLAN. DIGEST, 1972; 1(1):2).

370. CLIVE WOOD, INTRAUTERINE DEVICES 125 (1971).

371. Hartmann remarks: "The demographic objective is obvious in the very design of the drug: It is effective for five or more years. One wonders why a one-or two-year option was not developed first." HARTMANN, *supra* note 80, at 196. See also Barringer, *supra* note 286, at 6 (quoting Julia Scott, Director of Public Education and Policy for National Black Women's Health Project) ("Poor women, and disproportionately women of color, are seen as less capable of controlling their fertility.").

372. Julie DaVanzo et al., *Health Consequences of Contraceptive Use and Reproductive Patterns*, 265 JAMA 2692, 2695 (1991).

373. Brief of the American College of Obstetricians and Gynecologists District IX and Planned Parenthood Affiliates of California as Amici Curiae at 4, *People v. Johnson*, No. 29390 (Cal. Super. Ct. Tulare County 1990), *appeal docketed*, No. F015316 (Cal. Ct. App. 5th Dist. 1991) [hereinafter Brief of Amici].

374. Roberts, *supra* note 35, at 1423.

375. See *supra* note 67.

376. See *supra* notes 100-01 and accompanying text.



abusive home,<sup>377</sup> was raped by a stranger at age eleven, and had abused cocaine and LSD since she was a teenager.<sup>378</sup> She dropped out of school in the seventh grade, and was married and had one child by the age of fifteen.<sup>379</sup> She had also tried to commit suicide several times since the age of ten.<sup>380</sup> Melody Baldwin,<sup>381</sup> after being sterilized, having given her son up for adoption, and having received her sentence,<sup>382</sup> also attempted suicide.<sup>383</sup>

There has been a suggestion that Cathy Knighten<sup>384</sup> suffered from Munchausen's Syndrome by Proxy.<sup>385</sup> Knighten had told police that she felt burdened with her older children, aged three and four, and "hoped to keep her infant in the hospital."<sup>386</sup> She also told them she enjoyed the attention she received when her infant was ill.<sup>387</sup> Kathy York Rodriguez, who pled guilty to child abuse and was sentenced to ten years probation and forbidden to marry or conceive during that time, was described by the court as having "psychological and alcohol-induced problems . . ."<sup>388</sup> Williams was physically and sexually abused as a child, and was also beaten by her husband.<sup>389</sup> Livingston, who was sentenced for child abuse to two to five years probation with the condition that she not get pregnant as punishment for child abuse, was described by the court as having

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377. *Creative Judges*, *supra* note 15, at 1.

378. George Will, *How Can a Judge Impose Birth Control?* *NEWSDAY*, June 26, 1988, at 10.

379. *Creative Judges*, *supra* note 15, at 1.

380. *Id.* A psychiatric evaluation ordered by the court disclosed that Forster was "extremely self-centered, immature and irresponsible and unable to discharge her parental duties." *Id.*

381. *See supra* notes 102-03 and accompanying text.

382. Rather than reviving the mandatory twenty-year term, Baldwin was sentenced to ten years in prison. UPI, Nov. 19, 1988, *available in* LEXIS, Nexis Library, UPI File. Her suicide attempt occurred just days before the term was to begin. *Id.*

383. *Id.* This was not Baldwin's first attempt. Tybor, *supra* note 260, at 4 (Baldwin, "an unmarried former \$50-a-week waitress, . . . twice attempted suicide and, while awaiting trial, injected urine into her breasts.").

384. *See supra* notes 199-204 and accompanying text.

385. Had the case gone to trial, Knighten's attorney apparently would have argued that she suffered from Munchausen's Syndrome by Proxy. Rosenblum, *supra* note 17, at 276 n.5. Munchausen's Syndrome by Proxy is a term coined by Roy Meadow to "describe parents who, by falsification, cause their children innumerable harmful hospital procedures." Roy Meadow, *Munchausen Syndrome By Proxy The Hinderland of Child Abuse*, *LANCET*, Aug. 13, 1977, at 343, 343.

386. *Judge Orders Woman to be Given Contraceptive*, *supra* note 186.

387. *Id.*

388. *Rodriguez v. State*, 378 So.2d 7, 8 (Fla. App. 1979).

389. *Coyle*, *supra* note 88, at 248.

"an I.Q. substantially below 100."<sup>390</sup> Truly assistance-minded programs would stress therapeutic intervention rather than punishment.<sup>391</sup>

Most likely to be affected by Norplant sentences are women who are poor and of color.<sup>392</sup> It is estimated that as of January 1993, five hundred thousand women in the United States have been implanted with Norplant;<sup>393</sup> low-income women comprise a large percentage of this number, as Norplant is funded by Medicaid in all fifty states and the District of Columbia.<sup>394</sup> Some "truth" exists in the

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390. *State v. Livingston*, 372 N.E.2d 1335, 1336 (Ohio Ct. App. 1976). This case truly suggests that court-ordered contraception/Norplant is the new eugenics.

391. Fortunately, in the past the approach to child abuse has been based upon a belief that it is a social and psychological problem that deserves therapeutic and non-punitive responses. However, as the therapeutic mechanisms break down or prove inadequate, and society's demand for the amelioration of this social ill becomes stronger, while program funding decreases, there may be a shift in emphasis from concern for the individual to a concern for the children *en masse*. Coyle, *supra* note 88, at 252; see also William L. Baker, Note, *Castration of the Male Sex Offender: A Legally Impermissible Alternative*, 30 LOY. L. REV. 377, 378, 388-90 (1984) (exploring whether castration is more appropriately characterized as a punishment or a treatment for sex offenders, and concluding that "[t]he point at which castration exceeds its function to accomplish the intended societal goal—the prevention of reoccurring illegal sexual conduct—is the same point wherein treatment becomes punishment."). *Id.* at 389 (emphasis in original).

392. See, e.g., Roberts, *supra* note 35, at 1421 n.6 (noting "[t]he disproportionate prosecution of poor Black women" for exposing their fetuses to drugs). Poor women of color are also more likely to be under "governmental supervision—through their associations with public hospitals, welfare agencies, and probation officers." *Id.* at 1432. Black women are more likely to be reported to government authorities by health care workers. *Id.*; Scott, *supra* note 164, at 46 (noting that prosecutions for child abuse are influenced by race and citing a study that found that "black women were ten times more likely than white women to be referred for prosecution for substance abuse while pregnant). See also FEINMAN, *supra* note 151, at 27, 39-40 (noting that the major determinants of crime by women are drugs and poverty). This may also be, as Dorothy Roberts points out, attributable to the fact that poor women of color are "the least able to conform to the white, middle-class standard of motherhood." Roberts, *supra* note 32, at 1422.

393. *Norplant Use Increasing*, *supra* note 332. According to this report, approximately fifty percent of Norplant users are married, and seventy-five percent are younger than thirty years old. *Id.* It has also been estimated that around the world 1.8 million women use Norplant. *Id.*

394. *Implant Gains Among Poor*, *supra* note 12, at A1. According to one report "roughly half" of Norplant users are on Medicaid. See Kantrowitz & Wingert, *supra* note 347, at 38 (citing Dr. Michael Policar, Planned Parenthood's vice president of medical affairs). Another report states that sixty-one percent of Norplant sales have been to doctors in private practice. Tom Bethell, *Norplant is Welfare State's New Opiate; Contraceptive Doesn't Address Causes of Illegitimate Births*, L.A. TIMES, Jan. 24, 1992, at 5. A report from Florida states that approximately eighty-five percent of women implanted with Norplant in Florida were Medicaid patients. *Florida: Norplant Making its Mark Among Low-Income Women*, American Political Network, Feb. 19, 1992, available in LEXIS, Nexis Library, ABTRPT File.

myths that surround Norplant measures. For instance, there is evidence that "[w]omen are most likely to be poor when they are young, unmarried, and if they are black or Hispanic."<sup>395</sup> Similarly, "[s]tatistics consistently show that women . . . with lower family incomes have high levels of unintended pregnancy than others, indicating greater difficulty in meeting their childbearing goals."<sup>396</sup> There was thus a factual basis for Judge Broadman's suspicion that Darlene Johnson was on welfare and for the *Dominguez* and *Zaring* courts' assertion that single mothers burden the welfare system.

The frequency with which these characteristics coexist probably created the assumption that they always do,<sup>397</sup> and that these characteristics are part and parcel of the bad mother. The myth that the characteristics *must* coexist represents an untruth that many of us have internalized. The Norplant measures are evidence that our judicial holdings and legislation are at times not a reasoned response to the real lives of real people, but rather assaults on or defenses of cultural constructions.

2. *Context, Choice and Consent.* While concerns about Norplant's lack of user control were directed towards voluntary Norplant use, they apply equally, if not with greater force, when the decision to use Norplant is made in a coercive setting. In the welfare and probation contexts, the decision whether to use Norplant is more complicated than a choice among birth control alternatives; food and liberty hang in the balance. As Elizabeth Mensch and Alan Freeman have queried: "When does freedom bring coercion, and

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One commentator remarked that funding Norplant via Medicaid is, in practical effect, not that different from offering women incentives to use Norplant; Medicaid funding of Norplant could be seen as a racist attempt to curtail some women's fertility. Bethell, *supra*.

It has also been observed that middle income women—whose incomes are too high to qualify for medicaid but too low to cover the high cost of Norplant—are often unable to obtain Norplant. *Implant Gains Among Poor*, *supra* note 12, at B12. In response to criticism of Norplant's costs and the resulting inability of some women to obtain access to Norplant, Wyeth-Ayerst Laboratories, Norplant's marketer, established a fund to provide free Norplant kits to women not covered by Medicaid or private insurance. *Id.* Most recently, the United States purchased Norplant to distribute to women not covered by Medicaid, who otherwise could not afford the device. *Norplant Purchased by US Government*, MARKETLETTER, Jan. 25, 1993, available in LEXIS, Nexis Library, OMNI File.

395. Forrest, *supra* note 271, at 22.

396. *Id.* at 21.

397. See Roberts, *supra* note 32, at 1424 ("Poor Black women have been selected for punishment as a result of an inseparable condition of their gender, race, and economic status. Their devaluation as mothers . . . has its roots in the unique experience of slavery and has been perpetuated by complex social forces.").

when is coercion an instrument of freedom?"<sup>398</sup>

Kansas Representative Kathleen Sibelius, commenting on Representative Patrick's proposed bill to offer Norplant to welfare mothers, remarked: "The idea of choice, I think, is removed, if you have a starving person and you offer them food if they will do something. I don't think that's a very realistic choice."<sup>399</sup> It has been noted that choice in the probation context is similarly limited: Patricia Williams has written that the "vocabulary of allowance and option seems meaningless in the context of an imprisoned defendant dealing with a judge whose power is absolute."<sup>400</sup>

Whether truly informed consent can be obtained in probation contexts is thus doubtful.<sup>401</sup> In such coercive contexts women may be

398. Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 GA. L. REV. 923, 1126 (1991). See also CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 101 (1987) (referring to Supreme Court's legalization of abortion, and subsequent denial of public funding for abortion, MacKinnon wrote: "Preclude the alternatives, then call the sole remaining option 'her choice.'").

399. 60 Minutes, *supra* note 222, at 9.

400. Patricia Williams describes the "choice" between sterilization and jail: The defendant is positioned as a purchaser, as 'buying' her freedom by paying the price of her womb. And because that womb is in the position of money in this equivalence, it seems to many to be a form of expression, a voluntary and willing expenditure in the commerce of free choice.

WILLIAMS, *supra* note 263, at 32.

Williams, a law professor, recounts the class discussion of this issue: 'Why do you want to rob the defendant of his last little bit of freedom,' asks one [student]. 'But the defendant chose the castration,' says another. I continue: It is true that the transaction was structured as a contract. The power of that structure, however, transforms the discourse from one of public obligation and consensus into one of privatized economy. This positioning renders invisible the force of the state, and invisible the enormous judicial whimsy exercised in the selection of such a currency. It allows us to think that the state is not putting the cut on its citizenry; it allows us to sustain the fiction, the half truth, that the choice coming from the defendant's own mouth. It is he who is begging to be castrated. . . . The inversion of having the defendant beg to be dominated does not make the state any less dominating. . . . What does seem to be obscured is the fact that the state is creating a situation where it determines who shall have children and who shall not. . . .

*Id.* at 33-34.

401. The American College of Obstetricians and Gynecologists District IX and Planned Parenthood Affiliates of California filed an Amici Curiae brief in *Johnson* in which they argued that the Norplant probation condition violated the law of informed consent as well as usurped the patient/physician relationship. Brief of Amici, *supra* note 345, at 2-3. The brief maintained that the exchange between Judge Broadman and Johnson failed to meet the criteria for informed consent, as Johnson was not apprised of the risks and benefits of or alternatives to implantation with Norplant. *Id.* at 7. Moreover, the Amici argued that given the disproportion of power between Judge Broadman and Johnson and the fact that Johnson's liberty was at stake Johnson's consent could not have been voluntary. *Id.* at 16-17. According to the brief, consent is coerced "when the patient is threatened, either explicitly or by implication, with unwanted consequences un-

unlikely to make the same self-protective reproductive choices that they might otherwise make. Even in a non-coercive environment, the necessarily uninformed choice to use potentially harmful drugs is a difficult one, and women will often choose not to assume the risk.<sup>402</sup> In the probation context, the question of whether Norplant use would be advisable for a given woman—a question no judge is qualified to answer—is likely to be distorted or neglected. Judge Broadman directed Darlene Johnson to “tell” the doctors that she was “supposed” to get the implant.<sup>403</sup> How will this affect the treatment she receives? Might the doctors screen her less carefully? Might Johnson respond to her doctor’s questions so as to encourage him or her to approve the implantation, because she wants desperately to avoid jail? Similarly, what if, after being implanted, a probationer needed Norplant removed because of a medical reaction—would she need to consult to court for permission to have Norplant removed? Is that likely to occur quickly? A probationer might also avoid seeking medical assistance for complications ensuing from Norplant, due to fear that removal might lead to incarceration for failure to satisfy the probationary terms.

The woman on welfare implanted with Norplant as part of a Norplant incentive scheme would face similar problems. Women who receive implants and then drift out of the welfare system may not have the devices removed, increasing their chances of incurring health risks.<sup>404</sup> As this Comment suggested earlier, equally as trou-

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less the patient accede[s] to a specified course of action. The concern about coercion is the greatest when a disproportion in power between the patient and another individual lends credibility to the threat of harm.” *Id.* at 16-17 (citing PRESIDENT’S COMM’N FOR THE STUDY OF ETHICAL PROBLEMS IN MED. & BIOMEDICAL. & BEHAVIORAL RES., MAKING HEALTH CARE DECISIONS: THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP 65 (1982)).

The State of California, the respondents in *People v. Johnson*, conceded that Judge Broadman failed to get Johnson’s informed consent and agreed that the Norplant condition as imposed was invalid. Respondent’s Supplemental Brief, *supra* note 237, at 2.

402. The fear of injury, the need to protect oneself and one’s child, serves as a powerful disincentive to women to use a new possibly more effective (possibly even safer but how would you know?) contraceptive or drug to assist with pregnancy complications. This fear, and the limitation of options it imposes on women, serves to control the private practices of women’s sexuality.

Bennett, *supra* note 352, at 116-17.

403. Judge Broadman directed Johnson to return to him five months after sentencing for a hearing to demonstrate her compliance with the probationary terms. Judgment Proceedings, *supra* note 154, at 10. In the interim, Johnson was to contact the doctors at the health center and tell them: “you want this and that you’re there to get this thing done.” *Id.* at 10.

404. The American Medical Association issued a report condemning coerced use of Norplant—via court-order or incentive schemes. *Long-Acting Contraceptives*, *supra* note 17.

bling a thought is whether women who receive the implants and then change their minds will be granted removal upon request. Doctors may feel the women are "better off" with the devices in, and dissuade them from removal or simply refuse to perform the service.

Several ironies inhere in Norplant measures. Norplant was purportedly created in order to give women greater opportunities for controlling their own fertility, not for purposes of coercion.<sup>405</sup> Yet Norplant is being used in order to give the State more control over certain citizens. Second, rather than being an additional birth control option offering women increased autonomy, Norplant's lack of user control enables it to be used to remove as much or more of a woman's control over her reproduction as it gives.<sup>406</sup> It is also ironic that Norplant—a contraceptive device that, once implanted, cannot be controlled by its user—is being pushed via the Norplant measures as a means of offering child abusers and welfare mothers an opportunity to regain control over their lives. In fact, in imposing such external control, the State takes away women's control. The State thus perpetuates the condition it ostensibly aims to "treat."

These ironies are magnified when Norplant is considered in the probation and welfare contexts. One of the goals of the welfare system is to assist people in regaining control of their lives. Similarly, one of the goals of probation is to rehabilitate the defendant. Yet from one perspective the Norplant measures actually remove the opportunity for Norplant users to be independent and self-sufficient. This creates precisely the same dependence on the State that Norplant was presumably designed to sever.

Women may have babies not because, as the myth goes, the State gives them more money, but because it makes them feel that there is something constructive they can do.<sup>407</sup> Women may hit their

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405. See Marilyn Gardner, *Birth Control By Law*, CHRISTIAN SCI. MONITOR, Jan. 15, 1991, at 5 (quoting Sheldon Segal, developer of Norplant, as being "totally and unalterably opposed" to coercive use of Norplant).

406. In an interesting exchange between Johnson and Judge Broadman, the Judge expressed his view that, once developed, the manufacturers of Norplant could no longer control the use to which it was put. Judge Broadman questioned the weight to be given the statements of a scientist who had studied Norplant and advised against its use in a coercive environment, drawing a parallel to a scientist telling President Truman whether or not to drop the atomic bomb. Motion to Modify, *supra* note 181, at 6. Johnson's attorney responded, "I suppose once the product is developed, then it's in the market and it's really up to whoever [sic] has control of it to decide how its going to be used." *Id.* at 7.

407. They say no, no, no, no more kids. The welfare worker, she tells you you're overpopulating the world, and something has to be done. But right now one of the few times I feel good is when I'm pregnant, and I can feel I'm getting somewhere. At least then I am, because I am making something grow, and not seeing everything die around me, like all the time it does in the street, I'll tell you. They want to give me the pill and stop the kids, and I'm willing for the most part. But I wish I could take care of all the kids I could have, and then I'd want

children because of their sense of their own powerlessness: "Powerless women have always used mothering as a channel—narrow but deep—for their own human will to power, their need to return upon the world what it has visited on them."<sup>408</sup> Thus, the Norplant measures may not even address the reproductive behavior that is their focus.

Ascribing to it the best intentions possible, it might be said that in mandating Norplant via the judiciary and legislature, the State wishes to send a message about irresponsible behavior, about rash actions and violence towards those less powerful than oneself. This is admittedly a valid governmental objective. Yet, the Norplant measures actually serve to perpetuate the conditions that allegedly make them necessary. By removing women's control of their maternal bodies, the State sustains the myth that women are out-of-control and in need of externally imposed control. The Norplant measures represent a reaction to and a safeguarding of the tradition that, when faced with a whole woman, sees only her capacity for motherhood. That capacity then becomes the focus of State efforts to regulate the woman. The Norplant measures thus perpetuate the mother/body myth.

### CONCLUSION

*[T]he way the story is told is the story itself.*<sup>409</sup>

However one might distinguish them from the policies of the past, the Norplant measures express similar attitudes. The same myths surround both of them. These judicial and legislative proposals reflect and reenact myths about women who mistreat their children, poor women, single mothers, and welfare recipients. Additionally, and perhaps even more damaging, they legitimate a way of thinking.

Judges and legislators inevitably draw upon myths, and as part of the formal voice of the State, they legitimize them. When they draft opinions or statutes, judges and legislators write themselves

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plenty of them. Or maybe I wouldn't. I wouldn't have to be pregnant to feel some hope about things. I don't know, you can look at it both ways, I guess.

ROBERT COLES, 3 CHILDREN OF CRISIS: THE SOUTH GOES NORTH, 594-95 (1967) (Robert Coles presented this passage in poem form; I have rearranged it into prose). See also LEON DASH, WHEN CHILDREN WANT CHILDREN (1989). Dash interviewed pregnant teenagers in Washington D.C. and learned that they have diverse reasons for wanting children. As one interviewee stated: "Girls out here know all about birth control. There's too many birth control pills out here. All of them know about it. . . . Girls out here get pregnant because they want to have babies." *Id.* at 11.

408. RICH, *supra* note 22, at 20.

409. LOUIS MARIN, UTOPIQUES: JEUX D'ESPACES 151 (1973) ("[L]a façon de raconter l'histoire constitue l'histoire elle-même.").

and their culture into the law. Yet they have a choice as to *how* they proceed; they may choose to camouflage the myths upon which they rely, blending them into the legal landscape, or to unravel, expose and account for myths.<sup>410</sup>

By this process the myths that create, inform and destroy, silently acquire legal weight. They become real. When the myths are not identified or made explicit—more precisely, when the role they play in the decisional process is not anywhere visible—they are perpetuated. In order to counteract this process, or at least fully gauge its impact, we must be aware of its occurrence. The often indistinct line between the fact and fiction in myth makes this a particularly difficult challenge; myths, particularly to those inclined to promulgate them, have the ring of truth.<sup>411</sup> Judges and legislators are able to silently perpetuate the thinking that underlies their legal reasoning. They are able to do this because we share many of the same assumptions; we participate in the telling of myths.<sup>412</sup> We often come to accept something as true without realizing how our collective reinforcement gave it much of its meaning.<sup>413</sup>

410. I do not intend to suggest that judges unravel the fabric of their opinions, only that they take care to identify the threads they choose in creating their design.

411. See Rutherford, *supra* note 3, at 99 ("Myths only seem fictional to outsiders. Insiders view myths as true.").

412. See Ross, *supra* note 314, at 1513:

Legal rhetoric embodies dominant cultural assumptions. When judges construct their arguments, they must depend on assumptions widely shared by their audience. Judges depend on these assumptions both because they give their arguments power and the potential for influence, and because judges, as members of the culture, are likely to believe them.

413. In observing that Americans share a history of racism, and that each of us holds racist beliefs, often on an unconscious level, Professor Charles Lawrence writes that such unconscious racist beliefs,

are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings.

Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987). Ross makes a similar point:

In its assertion or suggestion of the difference and deviance of the poor, the rhetoric of poverty is both revealing and obscuring. The rhetoric reveals the reality of criminal and immoral behavior among the poor. The rich are not the only ones who defraud the government and abuse their children. At the same time, the rhetoric of poverty obscures the aspects of poverty that reflect our own lives.

The Court's arguments in the poverty cases are much more than rhetorical forms. They are a lens through which we see poverty. Once we accept the rhetoric's depiction of poverty, we are done, the answer to the legal question is ordained. For example, if we see the AFDC mother as different, prone to child



The law does not encourage revelation of thought process—at best it offers tools for disputing results. Even if a judge were to make a comment in court or in an opinion, revealing the myths to which he or she subscribes, her comment would likely be criticized,<sup>414</sup> and her decision might even be questioned,<sup>415</sup> but the underlying process—the means and myths by which he or she got from the presenting problem to the final outcome—would not be reached.<sup>416</sup> And consider how often the same process occurs without any revealing comment, or is signaled but in language that would not be grounds

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abuse, and an ungrateful recipient of public largesse, the legal issue of whether the government can demand home visits seems easily answered. By contrast, if we see [the AFDC mother] as like us, a mother struggling to hold her family together and keep a sense of personal dignity through it all, the legal issue becomes more problematic.

The rhetoric of poverty invites the reader to provide a part of the picture, to bring to the reading culturally taught, stereotypical assumptions about the poor.

Ross, *supra* note 314, at 1541-42. Ross maintains that the power of such rhetoric derives from its leaving its underlying assumptions implicit; the reader must make the connecting leap. If the assumptions were made explicit the reader might be uncomfortable and reject them. *Id.* at 1542.

414. The appellate court in *People v. Zaring*, for example, reversed Judge Broadman's most recent probation condition against pregnancy and rebuked Judge Broadman for letting his personal values infiltrate the case. 8 Cal. App. 4th 362 (Ct. App. 1992). In that case Judge Broadman *did* make his assumptions explicit when he said: "I want make [sic] to make it clear that one of the reasons I am making this order is . . .". *Id.* at 368. Yet the court did not reflect on why Judge Broadman might have come to the decision he did. The appellate court wrote: "[W]e are constrained by our oath to refrain from imposing our personal views on people brought before the bench. It is the law which must guide our actions and not our preferences or inclinations." *Id.* at 372. Judge Broadman, however, probably believed he was being guided by the law; he may have believed, because of the thought process by which he arrived at the conclusion that such an order was necessary, that the condition did meet the criteria imposed by law.

415. A judge might be reprimanded or suspended by an ethics committee, for instance. A Wisconsin judge was suspended for two years as a result of racially charged remarks not dissimilar from those made by Judge Broadman in *Zaring*. See *In re Gorenstein*, 434 N.W.2d 603 (Wis. 1989). The judge in that case "berated black women with minor children appearing before him on probation status reviews for what he viewed as a wholesale abuse of the welfare system in Milwaukee by blacks who had illegitimate children and did not want to work." *Id.* The judge had remarked:

I am sick and tired of supporting people. Seventy-five percent of the black people in Milwaukee are illegitimate. This woman has three illegitimate kids. I don't want to support her kids. . . . Seventy-five to eighty percent . . . of the people I see in court are born illegitimate and black and come from welfare families; and I pay for this courtroom and the staff and I am sick of it and so is the rest of Wisconsin.

*Id.* at 604-05.

416. Similarly, if a legislator sponsoring a bill were to identify the underlying assumptions that motivated its particular construction, and then publicly declare them, his or her constituents could only vote their approval or disapproval of the bill or the legislator, but not the process.

for reversal of the opinion or censure of the judge.<sup>417</sup> In addition, leaving criticism to others abdicates responsibility each of us should assume.<sup>418</sup>

The problem is not so much that judges bring their own morality to opinion writing; judging inevitably involves some level of subjectivism.<sup>419</sup> Rather, the danger lies in the extent to which that subjectivity is not recognized for what it is—and worse—is ascribed a greater, mythic truth. The cases and legislation considered herein demonstrate the consequences that can attend this phenomenon.

Acknowledging and coming to terms with some of the myths in which we put stock would be a first step towards counteracting this process.<sup>420</sup> Given the propensity for bias, the movement to counteract that bias must be intentional and deliberate.<sup>421</sup> Each of us, judges and legislators included, should be forced to confront our prejudices

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417. One wonders whether if Judge Broadman in *Zaring* had not said almost exactly what the sentencing judge in *Dominguez* said, whether the appellate court reviewing the probation condition barring pregnancy would still have inferred that Judge Broadman was "imposing [his] personal views" simply from the fact that he imposed such an order.

When language is more veiled, it is less likely to be found objectionable, although the accompanying action may still be challenged. In *State v. Mosburg*, 768 P.2d 313 (Kan. App. 1989), a court reviewing and reversing the trial court's probation condition prohibiting pregnancy for a woman who pled guilty to child endangerment remarked: "Although the trial court stated that it had 'no sympathy for someone that would cast a newborn upon the mercy of strangers,' there is no evidence of bias or personal prejudice against Mosburg." *Id.* at 316. It could be argued, by contrast, that the no pregnancy condition was itself evidence of bias or personal prejudice, but that the absence of language linking the condition with attitudes about the woman affected (present in *Zaring* and *Dominguez*) may have prevented the reviewing court from reaching that conclusion.

418. Martha Minow expressed this sentiment in this way: "Writing not just for judges, but for all who judge, I mean to invoke a broad array of people in the exploration of justice." Martha Minow, *The Supreme Court 1986 Term—Foreword; Justice Engendered*, 101 HARV. L. REV. 10, 15 (1987).

419. See Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?* 69 TEX. L. REV. 1929 (1991). These authors discuss some of the "moral errors" made by judges, such as in *Buck v. Bell*, 274 U.S. 200 (1927) and contemplate whether the judges might have avoided error by reading "counternarratives" that would have challenged their conceptions about the world. In considering why such moral misjudgments occur, the authors write:

One obvious explanation for these mistakes is judicial inability to identify, imaginatively, with the persons whose fate is being decided. Because of the particularized stock of life experiences and understandings judges bring to the bench, these notorious opinions seemed to their authors unexceptionable, natural, 'the truth.'

*Id.* at 1930.

420. See Lawrence, *supra* note 413, at 380; Delgado & Stefancic, *supra* note 391, at 1954.

421. See generally BERNARD L. SHIENTAG, *THE PERSONALITY OF THE JUDGE* 48-56 (1944) (arguing that it is essential for judges to recognize the virtual impossibility of attaining pure impartiality).

and to make them clear.<sup>422</sup> Judges and legislators, because of the power they have to enforce myths and their duty to serve the public, have a particular responsibility to "articulate their latest understanding of what we share."<sup>423</sup>

The range of women targeted for State-encouraged Norplant implantation is growing. Proposals are being directed not only at women on welfare and at certain female probationers, but also at girls considered at high risk for pregnancy<sup>424</sup> and, most recently, at all high school girls over the age of twelve.<sup>425</sup> New measures con-

422. Lawrence, *supra* note 413, at 380; see also SHIENTAG, *supra* note 393, at 53 (quoting MORRIS R. COHEN, REASON AND NATURE 81 (1931) ("[T]he hampering effect of narrow prejudice or prejudgment is reduced . . . by logical analysis or reflection, which, by making our premises explicit, shows them to be a part of the larger number of possible assumptions.")); Minow, *supra* note 418, at 16 ("I urge the judiciary to make a perpetual commitment to approach questions of difference by seeking out unstated assumptions about difference and typically unheard points of view.").

423. Lawrence, *supra* note 413, at 386; see also Minow, *supra* note 418, at 15:

Once we see that any point of view, including one's own, is a point of view, we will realize that every difference we see is seen in relation to something already assumed as the starting point. Then we can expose for debate what the starting points should be. The task for judges is to identify vantage points, to learn how to adopt contrasting vantage points, and to decide which vantage points to embrace in given circumstances.

424. See Tamar Lewin, *Baltimore School Clinics to Offer Birth Control by Surgical Implant*, N.Y. TIMES, Dec. 4, 1992, at A1 (reporting that clinics in Baltimore schools will provide students with Norplant); see also Tracey Kaplan & John Johnson, *Birth Control Implants at Valley School Defended*, L.A. TIMES, Mar. 26, 1993, at A5 (reporting that a school-based clinic in San Fernando, California offers Norplant).

425. Shortly after Norplant became available a radio talk-show caller suggested that "every girl should have it stuck in her arm at puberty." Goodman, *supra* note 364. Variations on this proposal have been advanced somewhat more delicately since. A West Virginia judge recently proposed that a twelve-year old be paid \$500.00 to be implanted with Norplant, and \$150.00 thereafter, presumably for as long as the contraceptive remained in place. Marilyn Gardner, *Paying Teenagers Not to Have Babies?*, THE CHRISTIAN SCI. MONITOR, Jan. 14, 1993, at 14. Similarly, a Professor at Penn State University proposed a system he described as a "future-oriented deferred gratification system" in which,

"[b]eginning in the seventh grade . . . [e]very four, six, or nine months, all female students could get a visual and hand-across-the-tummy-examination to determine whether or not they're pregnant. If not, they would receive a payment, perhaps \$25.00, with a matching payment going into an escrow account.' Every time they came in, the payment would be increased . . . as would the matching escrow payment."

*Id.* Norplant has not been tested on teenagers. Charlotte Allen, *Norplant—Birth Control or Coercion?*, WALL ST. J. Sept. 13, 1991, at A10.

The idea of paying teens not to get pregnant predates Norplant. In Denver in 1985 a program "designed to prevent second pregnancies among teenagers who have already been pregnant before the age of 16" went into effect. The Dollar-a-Day program teenage women attend a weekly meeting with counselors at the end of which they are paid seven dollars. See Nancy Kates, *Buying Time: The Dollar-a-Day Program*, in GENDER & PUBLIC POLICY 282 (Kenneth Winston & Mary Jo Bane eds., 1993).

tinue to be proposed.<sup>426</sup> The time to reexamine Norplant, and the myths we create and perpetuate, is now.

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426. Legislators in states where Norplant bills have previously been rejected are optimistic that they will pass this term. See Kantrowitz & Wingert, *supra* note 347, at 38 (reporting that Mississippi Senator Walter Graham thinks a bill requiring women with four or more children to be implanted with Norplant in order to qualify for public assistance will "eventually be approved"). In suggesting that Norplant might be made mandatory for some women on welfare, Governor Schaefer of Maryland stated: "We may be forced to make mothers take care of themselves." *Id.* at 37.

